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DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS.

VOLUME XXVIII.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN THE SECOND DISTRICT IN
MAY, JUNE, JULY AND DECEMBER, 1888; AND IN THE THIRD
DISTRICT IN MAY, 1888.

REPORTED BY
EDWIN BURRITT SMITH,
OF THE CHICAGO BAR.

CHICAGO:
CALLAGHAN & COMPANY.

1889.

Entered according to act of Congress, in the year 1889,
BY CALLAGHAN & COMPANY,
In the office of the Librarian of Congress, at Washington, D. C.

Rec. Nov. 27. 1889.

Stereotyped and Printed
by the
Chicago Legal News Company.

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DURING THE TIME OF THESE REPORTS.

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JACOB W. WILKIN, <i>Judge,</i>	- - - - -	Danville.
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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—DECEMBER TERM, 1887.

F. M. CHAPMAN

V.

THE DRAINAGE COMMISSIONERS OF DISTRICT No. 3.

*Drainage—Construction of Statute—Certiorari—Petition for Writ—
Laches—Classification—Informality—Estoppel—Practice.*

1. The failure of the commissioners to classify lands which should be classified at zero because not benefited by a proposed ditch, is an informality which will not sustain a petition for a writ of *certiorari* to have the proceedings for the organization of a drainage district quashed.

2. The drainage acts are liberally construed to promote the object in view.

3. The writ of *certiorari* is not a writ of right. Its allowance is within the sound discretion of the court and oral evidence may be heard as to whether it should be allowed.

4. Under the circumstances of the case presented the action of the petitioner in suing out the writ was too long delayed.

5. A question touching the failure of the record to show notice prior to the confirmation of the classification in question, can not be first raised in this court, especially as the record appears to have been made up by agreement.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of Iroquois County; the
HON. ALFRED SAMPLE, Judge, presiding.

This was *certiorari* commenced in the Circuit Court on the

petition of appellant filed March 17, 1887, and the writ was dated March 24, 1887, and return of service April 2, 1887. The petition for the writ recites the original petition for the formation of the drainage district under drainage act of July 1, 1885, giving a copy of the petition with the names of the signers, one of whom is the appellant, the petition being filed with the town clerk October 14, 1885, the order organizing the district, November 27, 1885, which order added certain lands to the district not prayed for in the original petition, and permitted additional signatures; certificate of drainage commissioners November 17, 1886, and an order that the amount of \$4,000 be raised by special assessment upon the lands of the district, as the same may be necessary, apportioning the amount among the several tracts, etc.; the town clerk's certificate and order of the commissioners of the graduated scale of classification (which is copied) signed by commissioners October 15, 1886; also amendatory classification as to several tracts of lands on the objection of certain parties, dated November 3, 1886; and a special assessment list made by the commissioners which is copied and dated and filed with the town clerk November 17, 1886.

The appellant then averred in his petition that he was the owner of all the lands mentioned in the special assessment list marked in the name of F. M. Chapman, and was interested in having said special assessment legally made and in having all the lands in said drainage district classified, and when found to be benefited, assessed their just and equal portion, and the petition showed that by the record aforesaid the whole of sections 19 in range 11, east 3 P. M., and 19 in 14, west 2 P. M. were omitted from the classification and assessment, and the N. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$ of section 23, R. 14, is included in the classification although lying without the district, and that N. E. S. E. section 23 is not included in the classification though wholly lying within the district; avers that such omission of such lands from the classification was illegal and without the jurisdiction of the commissioners and resulted in great damage to the petitioner, etc., and prays that the defendants may certify into court a full, true and perfect transcript of all the records,

papers, documents, etc., and files connected with the district, etc., and the court may inspect the record and proceedings and quash the same.

The commissioners answer the petition and adopt the papers and files set out in the petition, and add other portions of the record.

Order of the commissioners dated August 25, 1886, that on account of the jury assessing the right of way too high, etc., they abandoned the work as laid out (reciting the work abandoned) and ordering R. McDougall, a surveyor of said county, to make a survey and report.

Then map of survey by McDougall in lieu of the first work August 28, 1886, filed with clerk September 7, 1886, ordered new survey by Stanford and shows his report, gives map showing drainage across section 23 according to Stanford's report. New route adopted. The commissioners further answer that on account of the change in the route of the ditch said sections 19 and 19 would not be at all benefited and if said sections had been classified it would have been at zero, and no tax assessed against the same.

The answer further shows that a great proportion of the assessment on lands in said district have been paid and contract let for the work, and a great amount of money collected and paid out, so the parties can not be placed in *statu quo*, which answer was signed by the clerk and commissioners and filed in court June 2, 1887. May 31, 1887, appellant moved to quash a part of the return made by appellees, which motion was overruled. The cause was then heard, and the testimony of witnesses was heard in open court, and the petition was dismissed and *certiorari* quashed.

The cause was heard upon the petition, answer of defendants and the testimony, it being agreed between the petitioner and defendants that wherein the proceedings of the commissioners are purported to be set out by the petitioner in his petition they were correct, and that so far as defendants' answer purported to set out the proceedings of the commissioners the same were correct. The oral evidence showed that the commissioners talked the matter over in regard to the two sec-

tions 19, and came to the conclusion that after the change of the plan in the ditching, they would not be benefited; and if they had been classified, they would have been classified at zero. The commissioners did not know what to do, so they concluded to let it drop and not classify these lands. They did not think they had a right to change the district at that time. The petitioner was one of the prime movers to vacate the work, and adopt the plan now on file. He said he would give up his ditches, right of way, all his rights in the ditches. The ditches did not come within three-fourths of a mile of sections 19.

Messrs. KAY & EUANS, for appellant.

Messrs. HARRIS & HOOPER, for appellees.

LACEY, J. The only complaint in the petition was as to the failure of the commissioners to classify the two sections 19 and one other tract, and for classifying one tract not in the district. The only complaint made here in appellant's brief, is the failure to classify said two sections. The complaint as to the other tracts appears for some reason to be abandoned.

It pretty clearly appears from the evidence that on account of the change of the route of the ditch after the two sections had been taken into the district they would not be at all benefited by the drainage. The appellant was a promoter and adviser of the change made by the commissioners. According to the statute the two sections should have been classified, though if not benefited it might have been at zero. If they had been classified at zero no tax could have been assessed against them and the appellant could not have been benefited by any supposed reduction of his own tax by reason of the two sections having been classified. It is a mere technical complaint having no merit.

Sec. 15 of the Drainage Act of 1885 (see Session L. 1885, p. 82) provides that a petitioner shall be conclusively presumed to accept "the provisions of the act as to assessments, benefits and damages." He is estopped from complaining in

this proceeding that his assessment is not just and from seeking to quash the proceedings for that reason.

The Drainage Act, Sec. 78, provides "that the acts and proceedings done and the rights acquired (under this act), if in substantial compliance to law, shall not be held to be void from merely technical informality of proceedings, where no substantial rights of persons or property are adversely affected."

It will be seen from what we have said that "no substantial right of appellant was adversely affected." He was not injured by the failure to classify the sections in question to the extent of a dollar. The same section also provides that the Drainage Act shall be liberally construed to effect the object designed by the legislature. See opinion of this court in *Lees v. Drainage Commissioners*, 24 Ill. App. 487, affirmed in the Supreme Court by opinion filed at Ottawa May 9, 1887.

The writ of *certiorari* is not a writ of right. It is within the sound discretion of the court whether it will be allowed or not, and oral evidence may be heard to enlighten the court's conscience on that point. *Hyslop et al. v. Finch*, 99 Ill. 171.

The record shows that appellant delayed his action in suing out his writ from November 17, 1886, when the assessment was made, to March 17, 1887. The evidence shows that a greater proportion of the assessment on lands in the district had been paid and contract let for the work, and a great amount of money collected and paid out. But as the assessments were due before the writ was sued out the presumption would be that it was paid. Many other parties are deeply interested in this record and it would, no doubt, be a great damage to many to have the record quashed.

We think the court should not have exercised its discretion in allowing the writ, which it afterward quashed and cured the error. The appellant should have taken immediate steps. He waited too long. *Board of Supervisors v. McCoon*, 109 Ill. 142.

What has been said sufficiently disposes of all the points raised by appellant. One other question is raised in regard to the record failing to show notice prior to the confirmation of the classification under Sec. 23 of the act. This point, so far as

we can see, was not made in the court below, being made here for the first time. It appears also that the record was made up by agreement.

It was agreed "that wherein the proceedings of the commissioners are purported to be set out by the petitioner in his petition they were correct, and that so far as the defendant's answer purported to set out the proceedings of the commissioners, the same were correct."

The case was then tried on the proceedings as set out in the petition and answer. It did not purport to contain all the proceedings and papers and only so much of the record as was necessary to raise the question of the omission to classify the two sections was brought to the attention of the court. No point of want of notice was suggested or claimed in the petition and no record was thought necessary to be produced in the answer to show notice.

It would be taking an unfair advantage of the appellees to allow that question to be raised for the first time in this court.

Besides this, we think this petition was made too late.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

WILLIAM PARKER
V.
AMANDA PARKER.

Divorce—Desertion—Collusion—Division of Property—Contract.

A contract between husband and wife, dividing their property, in consideration of her refusal to live with him longer, entered into after he had made every reasonable effort to induce her to return to him, does not show collusion on his part for her to live separate and apart from him.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of Winnebago County; the Hon. O. H. HORTON, Judge, presiding.

Parker v. Parker.

MR. N. C. WARNER, for appellant.

No appearance for appellee.

LACEY, J. This was a bill originally filed by appellee for separate maintenance, and afterward, cross-bill by appellant for divorce on the ground of desertion.

The appellee failed to answer the cross-bill and default was entered against her. Upon hearing, the court dismissed the original and cross-bill for want of equity, from which decree this appeal is taken.

The refusal of the court to grant appellant a decree of divorce is assigned for error. The appellant was a man seventy-eight years of age and had been married previously and divorced; the appellee was some fifty-one years of age and had also been previously married and had been divorced, but had borne her first husband four children. The parties herein were married in August, 1882. They lived together peaceably until the 9th of July, 1885, when appellee, being somewhat ailing and subject to bad spells, left the appellant's house and went to her daughter's. The arrangement was that if she did not return appellant was to go after her; she did not return and appellant went for her according to arrangement. He did not wish her to stay but she refused to go home. He went after her several times after that and tried to get her to go home without avail. "He came six or eight times—came every day," says appellee's daughter. The appellee would not give her husband any answer whether she would go back home and live with him or not. In the meantime he had been staying alone at home. On the 15th July, 1885, she and Jessie, her daughter, came up to his place. He tried to get her to come back but she would not, and insisted on having a settlement of the property to fix it up. Appellant asked her what she wanted. He wanted her to be content to stay with him but she would not, so he finally told her that he would give her \$25 and the household furniture. She wanted him to relinquish his claim on her property and she would on his. So the division of the property was made on

this basis. Each of them owned real estate worth from eight to twelve hundred. He could not say that he knew the cause of his wife leaving him. He thought her children were jealous for fear he would spend his wife's property and they would get none of it. He always treated his wife kindly and she did him to his face. He always provided for his family and when she wanted anything she had the money in her pocket to pay for it. The agreement was reduced to writing, and declared it was entered into in consideration that she had refused to live with him longer and had left him, and in consideration that she would not tax his credit, while they lived apart, for her support, he gave her the \$25 and the furniture.

The appellant gave in his testimony in open court and the court cross-examined him, and asked him whether at the time the paper was made there was any understanding between them that they were to live separate, and the appellant answered that as he understood it they were to live separate. The court asked: "And this was an agreement and settlement of property to live separate after that?" Appellant answered: "Well, I was ready to live with her at any time." The court: "Was not that the intention of the agreement between you?" Answer: "I think it was the understanding that we were not to live together any more." And the court continued: "That being a final settlement of your affairs?" Answer: "I suppose so, unless she took a notion to come back."

Upon this state of facts it appeared that the court held there was collusion and a mutual agreement between the appellant and appellee to live separate and apart. Hence there could be no desertion as claimed in the bill. We are inclined to take a different view of the evidence. The appellant in all his evidence appears to be frank and truthful and is corroborated by all the other evidence in his statement of the facts, even by appellee's own daughter. It appears that he made every reasonable effort to induce his wife to return and she refused and would not give him any answer whether she would ever come back. No doubt she was politic in this as she wanted to get an advantageous compromise. A division

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of the property was what she wanted. He, no doubt, felt that there was no hope of her ever returning and we think the preponderance of the evidence justified him in so thinking. There is no evidence going to show that he desired a separation but simply yielded to the necessities of the case, and to save himself greater loss, as he thought, made the required division of the property. It seems to us he has tried throughout to do what was right and just by the appellee. She has never made any complaints, so far as the evidence shows, of his treatment of her. We think there was no collusion on his part for her to live separate and apart from him. It was a matter of necessity on his part. As he says he has always held himself in readiness to live with her but she still lives apart from him. We must hold, under the circumstances, that the appellant has made out a case of desertion by, at least, a preponderance of the evidence, and that he is entitled to a divorce under the statute. This is a case that rests mostly on the evidence and its peculiar facts, but we find support for the view we have taken in a case decided by the Supreme Court of the State of Michigan, which in its facts is quite similar to the facts in this case, and where it was held that the charge of desertion was made out. See *Staffer v. Staffer*, 50 Mich. 491-2. The decree of the court below is therefore reversed, and the cause remanded with direction to the court below to grant a decree of divorce as is prayed for in appellant's cross-bill.

Reversed and remanded.

THOMAS M. KELLY

V.

LOUIS DANDURAND.

Action on Account — Evidence — Weight of — Instructions — Excessive Judgment.

1. Where the verdict of the jury is based upon the evidence of the two parties to a suit alone, this court will not interfere.

2. A contract foreign to the issue is not admissible in evidence, although it is alleged to be the same as the one in question.

3. It is proper to refuse an instruction which is argumentative, which invades the province of the jury, or calls attention to particular evidence.

4. This court will not reverse a judgment because it is slightly in excess of an account filed, especially on objection here first raised.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of Kankakee County; the Hon. ALFRED SAMPLE, Judge, presiding.

Mr. STEPHEN R. MOORE, for appellant.

Messrs. RICHARDSON BROTHERS, for appellee.

LACEY, J. This was a suit on an account for hauling saw logs, brought by appellee against appellant before a justice of the peace, and by appeal went to the Circuit Court. The suit was tried there before a jury and verdict for appellee for \$96.91, and judgment on verdict. It appears from appellee's evidence that his claim originated as follows:

Appellant being the owner of some walnut timber standing in the tree on his farm, sold thirty-six trees to one Wentzelman for \$100 cash, when they commenced chopping the trees, and \$420 to be paid in four weeks. In March following, Wentzelman hired appellee to haul the logs at \$9 per thousand from Kelly's to Mr. Beckwith's. Under this contract the appellee commenced hauling the logs, and had two hauled when appellant, not being willing to trust Wentzelman for the pay, wanted the logs hauled in his name, and the lumber to be his until he was paid, and appellant became paymaster to appellee for the hauling. That the amount hauled was 10,763, at \$9 per thousand. The lumber was to be measured in the log. This evidence the appellant in his testimony entirely contradicts, and testifies that he never agreed to pay appellee for the hauling, and, in fact, he was not to pay him. Also produces evidence tending to show that after the logs were sawed the boards produced only measured 3,670 feet. We do not think that the weight of the evidence is so

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manifestly against the verdict of the jury that the judgment should be reversed for that reason. As to the contract, it was the oath of the one against the other, and the jury having found for the appellee, we are not at liberty to disturb the verdict. As to the amount of the lumber, the evidence is less satisfactory, yet we are inclined to think that the evidence on that point will sustain the verdict. The contract was, as appellee testified, that the lumber was to be measured in the log. It is possible that the appellee might have made a mistake in his measurement, and the men he had hauling the logs for him might have reported the wrong logs to him. As to appellant's measurement, there might have been some loss in sawing, causing a discrepancy between the log measurement and the board measurement, and there might have been a mistake by Wentzelman in keeping the right lumber separate and getting the right report as to what logs belonged to appellant. These were matters the jury had a right to consider and decide, and we are unable to say it did not decide correctly.

Complaint is also made that the court erred in excluding the written contract for the sale of logs between L. Brosseau and Wentzelman. It appears that appellee testified on cross-examination that the logs he hauled for Kelly he hauled under the same kind of agreement that he hauled for Brosseau under his agreement with Wentzelman, which showed that Wentzelman was to become paymaster and not Brosseau. We think the evidence was properly excluded. The contract had nothing to do with the issue. It was between other parties with which appellant had nothing to do. Neither was appellee a party to it. His contract to haul the Brosseau logs was verbal, although the contract between Brosseau and Wentzelman was in writing and might have been the same that he claimed to have with appellant. Nor was it proper by way of impeachment of appellee as a witness.

To admit such evidence would raise an issue foreign to the one being tried, that would need to be as much tried as the one under investigation. The contract did not show what the agreement of appellee with Brosseau was. There was no error in refusing the appellant's first, second and third in-

structions. The first raised a false issue. The appellee could rely on the whole evidence and was not confined to that given in by himself; and the instruction took the case from the jury. The second and third refused instructions were improper because they were argumentative and invaded the province of the jury, and called attention to particular evidence and sought to discriminate against the evidence of admissions. Such instructions have often been condemned by this court and the Supreme Court. It is insisted that the verdict and judgment is for 91 cents too much; that much in excess of the account filed. While this may be so we are of opinion that it is for too small an amount to reverse. The law will not notice trifles. It seems to have been discovered for the first time in this court and was not assigned as cause for new trial in the motion for a new trial in the court below. Had the attention of the court below been called to it, no doubt the matter would have been corrected there. The judgment of the court below is therefore affirmed.

Judgment affirmed.

WILLIAM SEEGER

V.

FREDERICK MUELLER ET AL.

Highways—Bill to Enjoin Obstruction of Alleged Highway—Want of Equity.

1. Equity will not do that which will be of no benefit to the party asking it, but only a hardship to the party coerced.

2. This court affirms a decree dismissing a bill to enjoin the obstruction of a strip of ground which had been designated as a road on a plat of school lands, and subsequently condemned as impassable by the commissioners of highways, it appearing that the complainant has no design to improve or use the road, but is actuated by spite and malice.

[Opinion filed May 28, 1888.]

Seeger v. Mueller.

APPEAL from the Circuit Court of Jo Daviess County; the Hon. WILLIAM BROWN, Judge, presiding.

The appellant filed his bill in equity in the court below, seeking to enjoin the appellees from obstructing twenty feet in width south and east of section 16, T. 28, R. 1, west 4 P. M., in Jo Daviess county, and from interfering with him, his agents, etc., from using and improving said strip, or removing obstructions therefrom so that it may be safe to travel, or from in any manner interfering with the free enjoyment of said road as may be for public or private use. That the appellees may be required to abate the nuisance of fences and obstructions placed by them on said road, etc.

It appears that the above section was school lands, and that the trustees of schools subdivided it into lots by a plat on which the roads are designated by double lines on which are written the words, "roads twenty feet wide." The appellant was the owner of three of the lots. The section was subdivided and platted in accordance with the provision of the laws of 1849, Sec. 17, which provides as follows: "That the trustees of schools shall divide the land into tracts or lots of such form and quantity as will produce the largest amount of money, and after making such division a correct plat of the same shall be made representing all the divisions, with each lot numbered and defined so that its boundaries may be forever ascertained, which plat, etc., shall be delivered to the school commissioner, and shall govern him in advertising and selling said lands."

Sec. 18. "In subdividing common school lands for sale, no lot shall contain more than eighty acres, and the division may be made into town and village lots, with roads, streets or alleys between them and through the same, and all such divisions, with all similar divisions hereafter made, are hereby declared legal, and all such roads, streets and alleys public highways."

The sale and subdivision of the school lands in question was made in 1856, and, we think, regular. The appellees also owned several of the lots in said section on which such road,

twenty feet wide around the whole tract, had been laid out, deriving their title, through the patentee, from the State. The road laid out was twenty feet wide around the entire section.

The patent conveyed the entire land, including the portion covered by the road, in accordance, however, with the plat of the trustees. The 16th section in question falls upon a rough tract of country, and is located among the hills and bluffs near the confluence of the Mississippi and Sinsinnewa rivers, and the portion where the road in question is located is exceedingly hilly and steep and full of deep, wide gullies, so that, without immense expense, out of all proportion to the benefits to be derived by complainant from any use of the road, the road could not be put in condition to travel.

Mr. E. L. BEDFORD, for appellant.

Messrs. D. & T. J. SHEEAN & McILUGH, for appellees.

LACEY, J. It is contended by appellees that the act in question authorizing the trustees to lay out school lands with roads, streets and alleys between the divisions applies only to streets and alleys where the land is laid out into town lots; that hence it is argued by them that the road was laid out without authority, the land not having been divided into town lots.

It appears from the evidence that the supposed road in dispute has never been traveled or worked by the public as a road since it was platted and since the land was purchased over twenty years ago. That portions of the supposed road have been fenced for over twenty years. The public authorities have refused to expend any money on the road on account of the impracticability of ever using it as a road, and had told appellee to fence it up. It appears also that appellant has now, and has had for many years, an outlet and road from his lots to the main public highway, and that even if the road were left open it could not be used without the expenditure of large sums of money on account of its narrowness and steep-

ness and its being crossed by deep ravines and gullies, and the evidence fully justifies us in believing that the appellant has no intention of using or improving the alleged road.

In 1878, the commissioners of highways of West Galena township, by a majority, condemned said strip and found it impassable; "that it would cost \$500 to open it and would have no road then."

One of the commissioners of highways, Patrick Dillon, testified that he had viewed the strip as a commissioner and condemned it. "We found it rough and impassable;" and says, "I should judge it would cost between \$8,000 and \$10,000 to put that strip of ground in passable condition for teams with loads." "Opening the road wouldn't benefit anybody."

Waiving the question of what is the proper interpretation of the statute in question in regard to the right of the trustees of schools to lay out the road in the manner they did, we are clearly of the opinion that the appellant failed to show any equity in his bill or to show any facts which would authorize a court of chancery to interfere.

The appellant seems from the evidence to be actuated by "spite" and malice toward the appellees in seeking to compel them to open the road in question and in seeking to restrain them from again fencing it in with the balance of their land as they had done before appellant tore it down. It does not appear that the appellant has the remotest design to improve or use the road, but that his only aim is to annoy appellees.

The appellees at least own the land occupied by the twenty-foot strip subject to the easement, if there be one, and the appellant and the public being unable to use it for the purposes of a highway, equity will not restrain the appellees from making use of it, or compel them to remove their fences from the strip in question.

"Courts of equity are not bound at all times to enforce a strict legal right." *Lewis v. Lyons*, 13 Ill. 117; *Stone v. Pratt*, 25 Ill. 25. "Equity will not do that which will be of no benefit to the party asking it and only a hardship on the party coerced." *Joliet, etc., R. R. Co. v. Healey*, 94 Ill. 416;

Green v. Green, 34 Ill. 327; Werden v. Graham, 107 Ill. 169.

The above rule of law meets with our full approval and we feel that its application is most appropriate in this case. The decree of dismissal of the bill by the court below is affirmed.

Decree affirmed.

E. H. RICKER

V.

D. C. SCOFIELD.

Promissory Note—Attorney's Fees—Costs—Pleading and Practice—Pleas in Abatement—Usury.

1. The matter of allowing new and independent pleas, presenting new defenses, is addressed to the discretion of the trial court, and this court will not interfere, unless it appears that such discretion has been abused.

2. After a plea in bar to an action, the defendant can not plead in abatement, unless for new matter arising after the commencement of the suit.

3. Pleas in abatement must be verified by affidavit.

4. An agreement for the payment of attorney's fees will not make usurious an otherwise valid contract or obligation, and it makes no difference whether the same was to be a certain sum, a reasonable sum, or a sum fixed at a certain percentage of the amount of either the debt or judgment.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

Mr. R. M. IRELAND, for appellant.

The errors assigned on this record all look to the statute of amendments and the practices thereunder. It has been held that under our present statute leave to amend pleadings so as to present an issue to the court on the merits of a case is no longer discretionary with the court, but is a legal right.

Ricker v. Scofield.

The Empire Fire Insurance Co. v. The Real Estate Trust Co., 1 Ill. App. 391; Drake v. Drake, 83 Ill. 526.

In regard to the assignment of error based on the court's refusing to allow the filing of the plea of usury, showing that ten per cent. was to be added to the face of the note if not paid when due, we simply wish to submit that if this agreement, when made, instead of being intended as a penalty for non-payment of the note when due, was intended as a device to evade the statute on usury, as is sometimes the case, and as the proof here might have shown, then the contract was usurious, and the plea should have been filed; for no trick, shift or device will be allowed in evasion of the statute. Ferguson v. Sutphen, 3 Gilm. 546; Shirley v. Welty, 19 Ill. 623; Sutphen v. Cushman, 35 Ill. 186.

Mr. J. W. RANSTEAD, for appellee.

BAKER, J. Ricker was sued in assumpsit by Scofield to the February term, 1887, of the Kane Circuit Court, upon a promissory note for \$530, dated March 15, 1880, due two years after date, and drawing eight per cent. interest per annum. The note contained a provision that in case a default was made in payment, then, "a sum equal to ten per cent. of the whole of said amount shall be added thereto for attorney's fees and taxed as a part of the costs in the court where suit may be brought."

At the return term, the general issue was filed, and issue joined thereon. At the same term, a special plea was interposed, and a demurrer to it was sustained by the court, and leave was taken to amend the plea, and the cause was continued with leave to file additional pleas.

The April term, 1887, of the court commenced on the 18th day of April. At that time the special plea had not been amended, and no additional pleas had been filed. The general order of the court was, that all pleas in civil cases be filed by the opening of court on April 21st, but on special application of appellant he was granted an extension of time until April 25th in which to file his amended and additional

pleas, and on the day last mentioned he filed four special pleas. Appellee, on the same day, filed a demurrer to said four pleas. It appears from the record that this demurrer was submitted to the court on the 29th day of April, and that on the 2d day of May the court sustained the demurrer to each and all of said pleas. Thereupon appellant made *seriatim* three several motions, each of which was refused by the court, and an exception taken. The first motion was for leave to plead over. The second motion was for leave to withdraw the general issue and file as pleas in abatement the first and fourth of the pleas filed April 25, 1887. The third motion was for leave to file an additional plea for usury, which was presented to the court.

At the time the court sustained the demurrer to the four pleas, and at the time the three aforesaid motions were made by appellant, the court was engaged upon the call of the common law docket for trial, with a jury, and the case at bar was the next case on the call; the plaintiff was in court ready for trial, and the case was immediately thereafter called for trial, and tried in its regular order on the docket. The verdict of the jury and judgment of the court were for appellee and against appellant for \$805.85, the amount of principal and interest due on the note after making deduction for a credit of \$50, indorsed on the note as of September 30, 1885.

No claim is made by appellant that there was any error in the rulings of the court in sustaining a demurrer to the special plea filed at the February term, and in sustaining demurrers to the four pleas filed at the April term. The assignments of error upon the record are three.

1. That the court, having sustained a demurrer to defendant's pleas filed April 25, 1887, erred in refusing defendant leave to plead over.

2. That the court erred in refusing leave to defendant to withdraw the plea of general issue, and to file as pleas in abatement the first and fourth of the pleas filed April 25, 1887.

3. That the court erred in refusing to allow the defendant leave to file his plea of usury.

1. There was no error in the action of the court in refusing to give to appellant a general permission "to plead over." The matter of allowing new and independent pleas, presenting new defenses to the action to be filed, is addressed to the judicial discretion of the trial court, and appellate courts will not interfere with the exercise of such discretionary power without it is plain there has been an abuse of such discretion. Under the circumstances of this case there was no abuse of discretion. The result of granting the leave asked would likely have been to continue the case. Had the court permitted that which appellant sought to obtain, it would seem, just cause of complaint would probably have been given to appellee. Both the statute and the courts are liberal in allowing amendments, either of form or substance, in any pleading in a case which will enable a defendant to make a legal defense. But here, no leave was asked to make an amendment; it was not proposed to amend the pleas or any of the pleas on file, or to obviate the objections in any of them, on account of which the demurrers had been sustained by the court. Whatever may have been appellant's statutory rights to amend his pleas, it is sufficient to say he did not seek to avail himself of them.

2. It is elementary that after a plea in bar to the action the defendant can not plead in abatement, unless for new matter arising after the commencement of the suit. 1 Chit. Pl., 441; Lindsay v. Stout, 59 Ill. 491; Thomas v. Lowy, 60 Ill. 512; Hawkins v. Albright, 70 Ill. 87. By filing the general issue and other pleas in bar appellant waived his right to plead in abatement. Archibald v. Argall, 53 Ill. 307, is almost or quite on all fours with the case in hand, not only in respect to the legal principle under discussion, but also in respect to the subject-matter of the proposed pleas in abatement. In Drake v. Drake, 83 Ill. 526, cited by appellant, no plea in bar had been pleaded, and it was merely held that under the present statute a plea in abatement of the character there involved was amendable. Another cogent reason to justify the court in denying to appellant the privilege of filing the proposed

pleas as pleas in abatement, was that neither of them was verified by an affidavit, and no offer was made to so verify them.

3. The additional plea of usury presented to the court and asked to be filed was not a good and issuable plea. It purported in its commencement to answer the whole cause of action, and in fact only answered as to the interest on the note. The supposed usurious contract alleged therein was not in any respect the same usury that was claimed and attempted to be set up in the two prior pleas of usury that had been pleaded by appellant; and besides, such contract was well known to him when he filed his former pleas, and if he thought it was usurious he should have interposed such defense sooner, and not when the case was on the eve of being called for trial. The court was fully authorized to doubt, under the circumstances, if the plea was offered in good faith. Besides this, the plea was without merit, and presented no defense to any part of appellee's demand. The substance of the plea was that when the note was given it was agreed that eight per cent. interest should be paid, and that if the note was not paid at maturity a sum equal to ten per cent. should be added to the whole amount, to be taxed as costs, and that said eight per cent. interest and ten per cent. added to be taxed as costs exceed the legal rate of interest. The presumption from the plea and the language used therein must be that the ten per cent. claimed to be usury is the attorney's fees of ten per cent. on the amount of the note that the note itself provides shall "be taxed as a part of the costs in the court where suit may be brought." It will be noted, the stipulation is not to pay appellee the ten per cent. in case of default, but merely that in case default is made in payment and suit is brought and judgment recovered, then a fee of ten per cent. on the amount is to be taxed as a part of the costs in the court for the benefit of the attorney prosecuting the suit to judgment, as a compensation for his services in that behalf. Contracts by the makers of notes to pay stipulated attorney fees in the event suits become necessary for the collection of such notes, are legal and valid contracts, and have been sustained and enforced by the courts in numerous cases. It is immaterial in that regard whether a stated sum is agreed upon as the fee, or the pro-

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vision is for a reasonable fee, or the fee is fixed at a certain per cent. upon the amount of either the debt or the judgment. It has not been the understanding of either the courts or the profession that such agreements for the payment of attorney fees would make usurious an otherwise valid contract or notes. *Dunn v. Rogers*, 43 Ill. 260, 263. We think that attorney fees thus provided for in a note can not justly be regarded as "interest," "discount," or "compensation" received or contracted for by the payee, in such sense as to render the principal contract usurious under section six of the interest act in force July 1, 1879.

Our conclusion is, that there was no error in overruling the several motions of appellant. The judgment is affirmed.

Judgment affirmed.

JOHN FARRELL
v.
AMELIA FARRELL.

Husband and Wife—Separate Maintenance—Extent of Allowance—Evidence—Threats—Receipt of Compromising Letters.

Upon a bill for separate maintenance it is *held*: That the evidence sustains the decree; and that an allowance of \$20 per month is not excessive, the husband being worth from \$15,000 to \$20,000.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Messrs. KELLOGG & CAMERON, for appellant.

Messrs. PUTERBAUGH & PUTERBAUGH, for appellee.

LACEY, J. This was a bill for separate maintenance insti-

tuted by appellee against the appellant. Upon answer the case was referred to the master to take the testimony and report his conclusions thereon. The master reported the evidence, and found the equities in favor of appellee, and that she was entitled to a decree of separate maintenance, and that appellant should be compelled to pay appellee a separate support of \$20 per month, commencing October 1, 1886. Exceptions were filed to the master's report by both parties; on the part of appellee because the allowance was inadequate, and by the appellant because the finding of the master was against the weight of the evidence and excessive. The court upon hearing overruled the exceptions of both parties and confirmed the master's report, and decreed that appellant pay his wife the sum of \$240 per year, commencing October 1, 1886, in quarterly installments in sums of \$60 each, and made the decree a lien on defendant's real estate. From the decree this appeal was taken. We do not think the amount is excessive, as the evidence shows that the appellant was possessed of and owned property to the value of from \$15,000 to \$20,000, mostly in productive property.

The only remaining question is whether the evidence justified the court in finding there were grounds for the decree of separate maintenance. After a full and careful reading of the evidence we are satisfied that there were sufficient grounds on which to base the decree.

It seems that the appellant became jealous of his wife on account of some letters of a compromising nature that she had received from other men. But the evidence fails to show that she ever responded to the letters, or ever had any improper relations with those men or any other. The letters, at the very worst, are only sufficient to raise a suspicion of wrongdoing against her, but are not proof of anything. Any person may write another a letter, and the person to whom it is sent can not prevent it. If such evidence should be held sufficient to blast one's character and establish guilt, no one would be safe. It seems further, from the evidence, the appellant had no just cause of complaint against his wife since their marriage, and his cruel treatment of her was not justified. The

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threat to shoot her was most unmanly and unjustifiable. A woman would be unsafe to live with a man who made such threats. Besides this, he terrified her by keeping a loaded revolver in his pants pocket, in the room where they slept. It will not do for appellant to claim that he made the threats in "fun." How was appellee to know that they were so made? When a husband makes such threats against his wife she has a right to regard them as made in earnest, and he can not complain that she does. His conduct was such that she fled from him in great terror, and we think not without just cause.

Seeing no error, the decree of the court below is affirmed.

Decree affirmed.

DAVID A. BARRY ET AL.

V.

ALEXANDER E. GUILD, JR.

Mortgages—Trust Deed—Foreclosure—Defenses—Covenants—Breaches—Estoppel—Choses in Action, Not Assignable—Cross-bill—Solicitor's Fee.

1. In proceedings to foreclose a mortgage brought by an assignee before maturity of the notes secured thereby, the mortgagor may interpose any defense of which he might have availed himself as against the payee of the notes.

2. A mortgagor in possession can not defend a bill to foreclose a mortgage given to secure purchase money on the ground of defects in the title of his grantor. If such title is defective, he must rely for relief on the covenants in the deed to himself, or such other contract as he may have with the grantor.

3. To constitute a breach of either the covenant of warranty or that for quiet enjoyment there must be a union of ouster or eviction and lawful and paramount title. Otherwise there is no right of action on the covenants or ground for relief in a court of equity, in proceedings to foreclose a mortgage given to secure purchase money.

4. The covenants of warranty and for quiet enjoyment when broken by actual ouster or eviction under paramount title, no longer run with the land, and a subsequent grantee has no right of action thereon.

5. In the case presented, it is *held*: That, as between the parties, the original deed in question must be taken to be an absolute conveyance; that the breaches of the covenants therein, if any, were choses in action which did not pass to the defendant by subsequent conveyances; that the evidence does not show an adverse possession under a paramount title; and that solicitor's fees were properly allowed.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of Du Page County; the Hon. C. W. UPTON, Judge, presiding.

Mr. ELLIS S. CHESTROUGH, for appellants.

Lack or failure of title to land, especially where the vendee has been evicted, has voluntarily yielded possession to the paramount title, or has never had possession, is failure of consideration and a good defense against purchase money notes given for such land. *Gregory v. Scott*, 4 Scam. 392; *Davis v. McVickars*, 11 Ill., 327; *Slack v. McLagan*, 15 Ill. 243.

Aside from the fact that Guild, as the trustee, the agent of both parties, could get no better title to the notes than his principal, the doctrine is firmly established in this State that the assignee of notes secured by mortgage, on suit to foreclose, is subject to any defense that may be maintained against the payee. *Olds v. Cummings*, 31 Ill. 188; *Smith v. Newton*, 38 Ill. 230; *Weaver v. Wilson*, 48 Ill. 125; *Towner v. McClelland*, 110 Ill. 542; *Shippen v. Whittier*, 117 Ill. 282.

Atkinson can be held (and hence purchase money notes to him defended) on his warranty to Guild, by any subsequent grantee, however remote. *Wead v. Larkin*, 54 Ill. 489; *Richard v. Bent*, 59 Ill. 38; *Rawle on Covenants for Title*, 5th Edition, Sec. 402.

And even a breach of covenant of seizin can be relieved against on suit to foreclose. *Latham v. McCann*, 2 Neb. 276; *Rice v. Goddard*, 14 Pick. 293.

And the reason for this rule is much stronger in the case at bar, as all the conveyances in the chain up to Barry are in equity conveyances by Atkinson, and his warranty to Guild was passed to the defendant Barry by Atkinson's direction.

It makes no difference that Atkinson may have been hon-

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estly mistaken as to the quantity of land if the mistake was mutual. *Champlin v. Laytin*, 6 Paige, 189; same case affirmed, 18 Wend. 407; *Voorhees v. De Meyer*, 3 Sandf. Ch. 614.

Mr. JAMES LLOYD, for appellee.

A grantor who conveys with warranty is concluded by his deed, and if he has not the land he warrants, it is his duty to acquire same to answer his covenants. *Jones v. King*, 25 Ill. 383, and cases cited; *Andrew v. Coleman*, 82 Ill. 26; *White v. Patten*, 24 Ill. 234; *Wynkoop v. Corning et al.*, 21 Ill. 484; *Stewart v. Metcalf*, 68 Ill. 109.

A party having mortgaged property is not permitted to deny his own title, but is concluded by his mortgage; his warranty estops him. *R. & M. R. R. Co. v. F. L. & T. Co.*, 49 Ill. 331, 344; *Wills v. Somers*, 4 Ill. App. 297; *Herman on Estoppel*, p. 8, Sec. 3; *Hall v. Mut. Fire Ins. Co.*, 32 N. H. 297; *Cabriska v. Columbus & C. N. R. Co.*, 23 How. 391; *Jones on Mortgages*, Sec. 682.

No party claiming title under a deed, however remotely, can be permitted to deny any fact recited in the deed under which he claims. *Byrne v. Morehouse*, 22 Ill. 603; *Richards v. Melerine*, 76 Ill. 453.

Where a fee simple estate is granted by deed, title of which defendant covenants to warrant and defend, he is estopped to deny the solemn fact so stated in his deed. *Jones v. King*, 25 Ill. 383.

On bill to foreclose mortgages, title can not be questioned in defense; this can only be investigated at law; if he took by virtue of his mortgage any estate whatever, which is still subsisting, he is entitled to a decree, and the court will not inquire what interest he has in the mortgaged estate, or whether he has any interest at all in some part of it. *Jones on Mortgages*, p. 1482, Sec. 1482.

The recitals in a recorded deed in the chain of title are such notice to a purchaser as would put him on inquiry as to the nature and extent of the matters referred to in the recitals. *C., R. I. & P. R. R. Co. v. Kennedy*, 70 Ill. 350; *Rupert v. Mack*, 15 Ill. 541; *McConnell v. Reid*, 4 Scam. 117; *Merrick*

v. Wallace, 19 Ill. 486; Monson v. Kelly, 22 Ill. 610; Morris v. Hoyle, 37 Ill. 150.

Where there is enough to put a prudent man upon inquiry in respect to the title to land, he will be chargeable with all the facts he might have learned by the exercise of reasonable diligence in making inquiry as to the matters to which his attention has been directed. *Citizens, etc., Bank v. Dayton*, 116 Ill. 257; *Crawford v. C., B. & Q. R. R. Co.*, 112 Ill. 314; *White v. Kibby*, 42 Ill. 510; *Harris v. McIntyre et al.*, 118 Ill. 275.

Where recitals are contained in a deed in a party's chain of title, he will be presumed to have read them. *Marks v. Gartside*, 16 Ill. App. 177; *Kibby v. White*, 42 Ill. 510; *C., R. I. & P. R. R. Co. v. Kennedy*, 70 Ill. 350.

BAKER, J. This is a bill in chancery, filed in the Du Page Circuit Court by Alexander E. Guild, Jr., against David A. Barry and others, for the purpose of foreclosing a trust deed mortgage, given by said Barry to secure unpaid purchase money. The defense interposed by the defendants is that the notes described in the mortgage are purchase money notes given to one John Atkinson as part of the purchase money for the lands on which they are secured; that said Atkinson was the equitable owner of the premises, and that the title to twenty acres of the land had failed; that said twenty acres had been conveyed to one Charles Fitzsimmons long before the conveyance to Barry, and that Fitzsimmons was at that time and still is in possession of said twenty acres, and that defendants were at that time unaware of either such purchase or possession; and the defendants ask that a just and proportional deduction be made for the portion of the land to which the title has failed.

Martin Sauber and Charles Frieauf were the owners in fee of two tracts of land in township 37 north, range 11, east of the third principal meridian, in Du Page county, Illinois, to wit: Lot number 2 in Witt's subdivision of west half of northwest quarter, section 14, containing forty-eight acres, more or less, and the fraction in south half of section 15, con-

taining ninety-six acres, more or less; and this last mentioned tract is situate on Sag Island, in the Desplaines river.

On the 10th day of August, 1868, Sauber and Friehanf, by their warranty deed of that date, conveyed, or attempted to convey, twenty acres of this island tract of land to Charles Fitzsimmons, and on the 8th day of May, 1875, they executed to him a quit claim deed for the purpose of correcting a supposed error in the description of the twenty acres intended to be conveyed by the former deed, and the first of these deeds was filed for record on the 15th of April, 1870, and the other on the 25th of May, 1875. Sauber and Friehauf, by deed bearing date March 27, 1869, and recorded April 3, 1869, conveyed to John Atkinson said lot 2, in Witt's subdivision, and also the fraction in section 15, and said deed contained their reservation, "excepting twenty-five acres heretofore conveyed by the said Sauber and Friehanf." The year before Atkinson purchased he knew of the sale to Fitzsimmons, and at the time he was buying Sauber showed him the line and the stakes of the Fitzsimmons tract. On the 25th of April, 1870, Atkinson conveyed an undivided half of the island tract to Edwin Walker, and on the 23d of January, 1884, one John H. Lomax received from the United States Marshal for the Northern District of Illinois a deed for said Walker's interest in the premises, it having been sold under an execution. On the 21st of June, 1884, said Lomax procured a tax title to the whole of said tract of land.

On the 26th of June, 1884, Atkinson executed to Alexander E. Guild, Jr., a deed with full covenants of seizin of a right to convey, for quiet enjoyment, against incumbrances, and of warranty for the undivided one-half of said lot number 2, in Witt's subdivision, and for the undivided one-half of the fraction in south half of section 15, and on January 30, 1885, said Guild executed to George A. Gindele a special warranty deed against his own acts, for the same property. After the execution and delivery of these two deeds, Atkinson continued to be the real and equitable owner of the property conveyed. The object of the conveyances was to secure the payment by Gindele to Guild of \$150, for the benefit of

Atkinson, and to enable Atkinson to raise money with which to fight the tax title of Lomax. The arrangement was that Gindele should have the one-fourth of the one-half interest of Atkinson for clearing the title of the tax deeds. The proposed litigation was commenced and prosecuted to a successful conclusion. See *Lomax v. Gindele*, 117 Ill. 527.

Afterward Atkinson sold his three-fourths interest in the undivided one-half of the property to the appellant Barry for \$4,500, and on May 6, 1886, Gindele executed a deed, with covenants against his own acts, for an undivided three-fourths of an undivided one-half of lot 2 above mentioned, and for an undivided three-fourths of an undivided half of the fraction in the south one-half of section 15, in T. 37 N., 11, E. of the third principal meridian, containing ninety-six acres. Said Barry executed, and, on said 6th day of May, acknowledged and delivered the trust deed mortgage here in suit. It conveyed and warranted all the property described in the deed from Gindele to him, Barry, in trust to Alexander E. Guild, to secure the payment of \$4,000 purchase money included in promissory notes given by Barry to Atkinson, and interest thereon. These notes were afterward assigned before maturity by said Atkinson to said Guild, and the present bill to foreclose was, after default by Barry, exhibited by Guild.

It is the firmly established doctrine in this State that when the assignee, before maturity of notes secured by a mortgage, comes into a court of chancery to foreclose the mortgage, he holds such mortgage subject to all the infirmities to which it would have been liable in the hands of the assignor, and that the mortgagor may avail himself of any defense he could have interposed as against the payee of the notes, and this rule is based upon the ground the mortgage is not at law an assignable instrument. See *Olds v. Cummings*, 31 Ill. 188, and numerous subsequent cases.

Atkinson having conveyed the lands to Guild by a deed which was absolute upon its face, and having procured the title to be conveyed through said deed and the subsequent deeds from Guild and from Gindele to Barry, who was purchaser for a valuable consideration of the equitable interest

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of Atkinson in the lands, would now be estopped from claiming that such supposed deed was absolute under a secret agreement shown only by extrinsic evidence, and of which Barry had no notice—merely a mortgage to secure the payment of \$150 to Guild. As between Barry, the purchaser for value without notice, and Atkinson, or his assignee, claiming the benefit of the mortgage, the deed from Atkinson must be regarded to be what it purported to be; that is, an absolute deed to Guild with covenants. Barry should have the full benefit of the contract which he intended to, and apparently did make, and which the conduct of Atkinson, Guild and Gindele justified him in believing he was making. On the other hand, Atkinson and Guild should only be held for such kind and degree of liability as the contracts they assumed to make would render them responsible for. The covenants of seizin, of good right to convey, and against incumbrances, contained in the deed to Guild, were personal covenants not running with the land, or passing to Guild's grantees, and if there have been breaches of these covenants, then such breaches occurred as soon as the deed was executed and delivered, and vested in Guild choses in action which were not assignable and did not pass to Gindele or to Barry. The covenants in the deed for quiet enjoyment and of warranty ran with the land, and passed to Barry by the deed from Gindele.

It is insisted by appellee that the deeds in the chain from Atkinson to Barry only purported to convey an undivided interest in ninety-six acres of land, and that the evidence shows that the fractional tract in section 15 contains that number of acres, after making deduction for the twenty acres conveyed to Fitzsimmons. The position assumed is untenable, both in respect to matter of fact and matter of law. There is no competent evidence either to show or tend to show that ninety-six acres remain after deducting the twenty acres; the evidence in that behalf is mere hearsay and surmise. The presumption of fact would be, in the absence of proof to the contrary, that as the tract contained ninety-six acres according to the government survey, it, in fact, still contains that

number of acres, and that if the title has failed to twenty acres, then only seventy-six acres were conveyed to Barry. But the statement in the deeds, "containing ninety-six acres, more or less," is of comparatively slight importance. That which Barry contracted for, and the deeds purported to convey to him, was an undivided three-fourths interest of an undivided one-half interest in the fraction in the south half of section 15. That which the deeds demanded was an undivided interest in the legal subdivision of land named in the second call of the deeds, be the actual number of acres more or less. The purchaser took the risk of a mistake in the government survey that would make the actual quantity of land less, also of loss from the island by erosion; and he was entitled to the benefit, if any, not only of a mistake in the original survey that might increase the actual quantity, but of any gain by accretions.

Upon a bill to foreclose a mortgage given for purchase money, a mortgagor in possession can not defend on the ground of defects in the title of his vendor. He can not retain the land under a title which, by force of the statute of limitations, may ripen into a good title, and at the same time refuse to pay for the land. The doctrine is that where there has been no fraud and no eviction under paramount title, the vendee, or a party in possession under him, can not controvert the title of the vendor; that in such cases the vendee and those claiming under him must rely for relief on the covenants in the deed of the vendor, or other contract he may have; and that the courts will not substitute for the contract of the parties one which they did not make. *Beebe v. Swartwout*, 3 Gilm. 162; *Smith v. Newton*, 38 Ill. 230; *Weaver v. Wilson*, 48 Ill. 125; *Peters v. Bowman*, 9S U. S. 56; *Latham v. McCann*, 2 Neb. 276.

It is suggested by appellee in his brief that appellants filed in the court below no cross-bill asking for affirmative relief. In *Beebe v. Swartwout* a cross-bill was filed; but in *Weaver v. Wilson*, where there was a condition in the note, a proportionate deduction from purchase money was allowed upon answer. But, in the view we take of the case, it is not essen-

tial to determine the point whether a cross-bill is necessary. So, also, in *Beebe v. Swartwout*, there is a *dictum* to the effect that in the absence of fraud a court of chancery would have no jurisdiction to set off damages accrued for breach of covenant in the vendor's deed against purchase money, unless the vendor was insolvent. In view of the liberality that now prevails in chancery courts in respect to the allowance of equitable set-offs and recoupments, and of the cases we find in the books, and especially in view of the present statute allowing conditional or deficiency decrees and general execution against the property of the mortgagor, it may well be doubted if the rule suggested would now be held. But, this point also, it is unnecessary now to decide.

The only breaches of covenants that appellants set up in their answer are "that the title to twenty acres of said land has failed" and "that said tract of twenty acres had been conveyed to one Charles Fitzsimmons long before this defendant Barry gave the aforesaid mortgage; that said Fitzsimmons was at that time and still is in possession of said tract, and that the defendants were unaware of either the purchase or possession, aforesaid, of said Fitzsimmons, at the time the defendant David A. Barry purchased the premises described in the bill and executed his notes therefor." The presumption from this pleading, even without the aid of the rule that all pleadings must be taken most strongly against the pleader, would be that Fitzsimmons was in the actual possession of the tract prior to the date of the conveyance to Barry, and while the title of Atkinson was either in Gindele or Guild, or before Atkinson made the deed to Guild. If the twenty acres were in the adverse possession of Fitzsimmons at the time that Atkinson made his deed to Guild, then not only the personal covenants in such deed of seizin and of good right to convey, but also the covenants of warranty and for quiet enjoyment were broken immediately, and the cause of action for breach of such covenants was in Guild. 2 Jones on Mortgages, Sec. 1502. If the entry and adverse possession under paramount title were while either Guild or Gindele held the title of Atkinson, then the breaches of the covenants that ran with

the land were either in the day of Guild or in the day of Gindele. Hence, the cause of action as shown by the answer accrued to either Guild or Gindele, and was not assignable, and did not pass to Barry by the subsequent deed or deeds. Covenant does not lie by an assignee for a breach done before his time, and it is immaterial that the covenant is one which otherwise would run with the land. † Kent's Com., star pages 471, 472, etc., and authorities cited in note "A" to star p. 472. The covenants of warranty and for quiet enjoyment pass to the assignee where the eviction is subsequent; but such covenants, when broken by actual ouster or eviction under paramount title, no longer run with the land, and do not go to the heir, devisee or grantee. *Bedoe's Executor v. Wadsworth*, 21 Wend. 120, and cases there cited.

The case made by the evidence is not different from that suggested by the answer. The only testimony tending to show an adverse possession of the twenty acres is that of Gindele, who states that he never had or could get possession of the twenty acres either personally, when he held the legal title to Atkinson's interest, or subsequently as agent of Nunnemacher, who is purchaser from Barry and one of the appellants herein. It does not appear from his testimony that he has been on the land since 1869, 1870 or 1871, and he is not certain he was on the twenty acres then. He states that he has passed close to the land every year since 1869, sometimes several times a year, sometimes a couple of times a month. He says that the Bodenschak and Earnshaw Stone Company are in possession of the land, and have a derrick, steam engine and tool house there, and that the first and last time he saw the tool house and derricks was in July or August, 1887, and it was from the railroad cars, and he was about half a mile from the tool house, and does not know whether the land is fenced or not. There is nothing in this evidence to show that the Bodenschak and Earnshaw Stone Company had not been in possession of the land, and the derrick and tool house were not standing thereon long prior to the conveyance to Barry. In fact, Gindele says in his examination that he never knew anything about the location of the twenty-acre tract or the improvements thereon

until in the summer of 1887, when his attention was called to them by Mr. Colby and Mr. Chesbrough.

It is urged by appellants that a breach of the covenant of seizin can be relieved against in a suit to foreclose; and that all the conveyances in the chain up to Barry are, in equity, conveyances by Atkinson, and his covenants to Guild were passed to Barry by his, Atkinson's, direction. Even if Atkinson continued to be the equitable owner and the deeds from Guild and from Gindele were under an agency from him, yet the scope of that agency, until the deed to Barry was made, was merely for the purpose of contesting the tax title of Lomax. The deed to Barry was not within the scope of the agency that existed when the deed of Atkinson was executed. But even if it was, the scope of the agency could not be extended beyond the covenants contained in the deeds that were in fact made. The court has no power to make a new contract for the parties. They must all be bound by the bargain they have made. In the absence of fraud or mistake, the contract, as shown by the conveyances made, must be the measure of the rights vested and the liabilities imposed. Barry must be presumed to have known the legal effect of the title papers he took, and to have been content therewith. It must be considered that had it been the intention of the contracting parties that Barry should have the benefit and Atkinson should assume the burden of covenants from the latter of seizin and of good and lawful right to convey, then such intention would have been carried into effect by a quit claim deed from Gindele to Atkinson, and by a deed from the latter to Barry containing such covenants, or in some other appropriate way.

Probably the most fatal objection to the claim of appellants is the fact that it does not appear from the evidence that the possession of the Bodenschak and Earnshaw Stone Company is under paramount title. The only thing that tends in the least to connect that company with the title of Fitzsimmons is the answer of Gindele to the question, "Did the company state to you how they obtained title?" His answer is: "Yes, sir, through Fitzsimmons." Whatever probative force there

might otherwise be in this question and answer, it is wholly destroyed by the statements of the witness on cross-examination. He there says: "I never stated that Bodenschak and Earnshaw got possession through Fitzsimmons. I said they had possession, but I don't know how they got it. I am positive that I did not say in my direct examination that they got possession through Fitzsimmons. If I did, I was mistaken, that is all, because I do not know how they got possession." So, assuming that the outstanding title of Fitzsimmons is the paramount title to this twenty acres of land, it does not appear that the adverse possession held by the stone company is under such title.

To constitute a breach of either the covenants of warranty or that for quiet enjoyment, there must be a union of ouster or eviction and lawful and paramount title. Otherwise there is no right of action on the covenants, or ground for relief in a court of equity upon bill filed to foreclose a mortgage given for purchase money. *Beebe v. Swartwout, supra*; *Peters v. Bowman, supra*; *Latham v. McCann, supra*; *Hill v. Butler*, 6 Ohio St. 207; 2 Jones on Mortgages, Secs. 1500, 1501, etc.

For the reasons we have indicated herein, we are of opinion there was no error in the action of the Circuit Court in refusing to allow, as a credit upon the notes and mortgage, the relative and proportionate value of the land in the possession of the stone company, and in rendering a decree in favor of appellee for \$4,356.50, the full amount of principal and interest on the notes.

We also think it was not error to allow the solicitor's fee of \$100 to be taxed as costs. The fee was expressly provided for and its amount fixed in the mortgage deed; and although appellee presented the bill of complaint in his own behalf, yet it appears from the record that at the taking of the depositions and testimony he was represented by a solicitor, and that at the hearing of the cause he appeared by counsel, who argued the case in his behalf. The decree is affirmed.

Decree affirmed.

Berry v. Hanks.

CYRUS L. BERRY
V.
ELIZABETH A. HANKS.

28	51
46	248

*Exemptions—Personal Property—Secs. 13 and 15, Chap. 52, R. S.—
Deserted Wife—Family—Sufficiency of Schedule—Fraud.*

1. A deserted wife without children is a "family" within the meaning of Secs. 13 and 15, Chap. 52, R. S., and is entitled to personal property of the husband to the amount of \$100.

2. In the case presented, this court holds that a sale by the wife of property so exempt before the same was levied upon, and the taking of it back after such levy, can not be considered fraudulent, although the statute requires the scheduling of property before the allowance of the exemption for which the law provides.

3. The omission of some property of the debtor from the schedule will not work a forfeiture as to the articles named therein.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of Peoria County; the
Hon. T. M. SHAW, Judge, presiding.

Messrs. STARR & STARR, for appellant.

The language of the statute and the policy and intent of the law is, that there shall be a family to receive the benefit of the statute. It is a relation of *status*, not of contract. Thompson, Homestead and Exemp., Chap. 2, Sec. 40, etc.

The language of the Illinois statute is, that after the head of the family has deserted his family, "the family shall receive," etc. Other statutes and codes say "wife and children," or "wife," or "either husband or wife," or "widow and children." Thompson, Homestead and Exemp., Sec. 40, etc.

The Illinois statute contemplates that a family must remain, and uses that language.

In *Rock v. Hass*, 110 Ill. 529, in a full consideration of the subject, the Supreme Court decided that a family can not consist of one person.

This is consonant with the reason of the rule and the adjudicated cases, to the effect that when the relation of dependence is wanting, there can be no family to claim the benefits of the act. A married woman whose husband did not reside with her, having no children, held, not entitled to the exemption, under a statute similar to our own, using the word "family," for the reason that there was no family—no one dependent on her. *Thompson, Homestead and Exemp.*, Sec. 68. See also *Race v. Oldridge*, 90 Ill. 150.

The Illinois decisions are uniform and strong upon the point that exemptions should not be allowed to party attempting to deceive and defraud, and although "property might have been exempt if no sale had been made, yet sale having been made to defraud creditors, debtor can not take it back so as to recover triple damages." *Cook v. Scott*, 6 Ill. 333; *Cassell v. Williams*, 12 Ill. 387; *Getzler v. Saroni*, 18 Ill. 511; *Cipperly v. Rhodes*, 53 Ill. 351.

Messrs. O'SHAUGHNESSY & MAPLE, for appellee.

A widow, whose children have all left her, and who remains on the farm, is head of a family. *Collier v. Latimer*, 8 Baxter (Tenn.), 420.

Whether or not appellee was the head of a family was a question for the jury. *Race v. Oldridge*, 90 Ill. 250; *Barnes v. Rogers*, 23 Ill. 350.

The case of *Rock v. Hass*, 110 Ill. 529, cited by counsel for appellant, refers to the statute exempting a homestead, which reads, "Every householder having a family," etc. The court might well hold under this statute and under the facts of this case, that upon the death of the husband, the wife would not be entitled to the homestead exemption. The widow in this case had children who were not living with her. But we are aware of no case where the husband and wife were living together on a homestead, in which the court of last resort in this State has decided that the survivor has not a homestead exemption for the reason that there are no children or other persons living with him or her. On the contrary, it has decided just the reverse.

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A widow without children, with servants alone, is entitled to a homestead. *White v. Plummer*, 96 Ill. 394. In *Kitchell v. Burgwin*, 21 Ill. 45, the court says: "Having a wife is having a family."

A childless widow is within the words "family of the deceased." *Estate of Walley*, 11 Nevada, 260.

The right of appellee and Lewright to rescind the contract of sale can not be disputed. It was outside and disconnected from any claims or rights of appellant. If the sale was fraudulent, being made to hinder and delay creditors, no title passed, and if the property was not exempt, it was just as liable for Hank's debts as if no sale had been made. Nor would the sale, if fraudulent, destroy appellee's claim for exemption. *Redden v. Potter*, 16 Ill. App. 265; *Bell v. Devore*, 96 Ill. 217; *Wilcox v. Hawley*, 31 N. Y. 648; *Tracy v. Cover*, 28 Ohio St. 61; *Hanes v. Tiffany*, 25 Ohio St. 549; *Megehe v. Draper*, 21 Mo. 570; *Mosby v. Anderson*, 40 Miss. 49; *Vaughn v. Thompson*, 17 Ill. 78; *Ketchum v. Allen*, 46 Conn. 416; *Crummen v. Bennett et al.*, 68 N. Car. 494; *Sears et al. v. Hanks et al.*, 14 Ohio St. 298.

The rescission of the sale made the *status* of the property exactly what appellant claimed it to be, so far as ownership was concerned, when the writ of attachment was levied.

A debtor can sell property that is exempt, and it is no fraud upon his creditors. *Green v. Marks*, 25 Ill. 223; *Ives v. Mills*, 37 Ill. 75; *Bliss v. Clark*, 39 Ill. 590.

After a debtor has selected \$300 worth of property exempt from execution, any execution against the debtor must be levied on other property and an officer can not justify himself in the sale of selected property on the ground that the debtor had other property. *Austin v. Sevank*, 9 Ind. 109; *Megehe v. Draper*, 21 Mo. 510; *Douch v. Rahner*, 61 Ind. 64.

Protection is withdrawn from property not scheduled. *Blair v. Parker*, 4 Ill. App. 409. But it does not follow from this that protection is withdrawn from property that is scheduled. A schedule is not bad on account of omissions. *State v. Reed*, 94 Ind. 103. Debtor has valid claim of exemptions, though he fraudulently conceals other property, and refuses to surrender the same in execution. *Elder v. Williams*, 16 Nev. 416.

LACEY, J. The appellee sued the appellant, who was sheriff of Peoria county, averring in the declaration that he, under writ of attachment in favor of Allen Fahnestock against her and her husband, Green P. Hanks, for the sum of \$92, issued out of the Circuit Court of said county, on December 18, 1885, levied upon certain goods of Green P. Hanks, of the value of \$200, at the time of such levy in the hands of the appellee; that on November 10, 1885, said Green P. Hanks was the head of a family and resided with the same in said county, and about that date deserted his family, and continued in such desertion till the time of filing the declaration; that appellee was his wife at the time of such desertion, and up to that time had constituted his family; that on December 21, 1885, she made a schedule of all the personal property of every nature and kind of Green P. Hanks, including money on hand and debts due and owing him, and subscribed and swore to the same and delivered it to defendant; that on December 29, 1885, appellant summoned three householders and caused them to be duly sworn, to fairly and impartially appraise the property of said Green P. Hanks, which appraisal aggregated less than \$400; that thereupon she selected such articles in said schedule as exempt, under the statute, from attachment, and appellant refused to deliver the same to her, or release it from said levy, whereby she claimed as damages double the value of said property.

The declaration was demurred to by appellant; demurrer overruled and appellant pleaded over.

The cause was tried by a jury, and verdict for appellee for \$232.90, and judgment on the verdict, from which this appeal is taken. The appellant insists that the appellee was not a "family" within the meaning of Secs. 13 and 15, Chap. 52, R. S., and only entitled, as an individual without a family, to an exemption of \$100, which she received; that out of the property levied on she was entitled to no exemption; that she did not comply with the statute in making her schedule and turning out to the sheriff the property in question.

The first point raised calls for a construction of the above sections. Sec. 13 reads as follows, when specifying the exemptions, viz.:

“One hundred dollars worth of other property to be selected by the debtor, and in addition thereto, when the debtor is the head of a family and residing with the same, three hundred dollars worth of other property to be selected by the debtor.”

Section 15, under which the appellee claimed the property in dispute, provides as follows: “When the head of the family shall die, desert, or not reside with the same, the family shall be entitled to and receive all the benefit and privileges which are by this act conferred upon the head of the family residing with the same.”

The direct question here raised, so far as we have been able to find, has never been passed upon by the Supreme Court or any of the Appellate Courts, and is not entirely free from difficulty. We are constrained to hold, however, that the appellee, under the statute, was entitled to the exemption her husband would have been, had he been residing with and making up a part of the family.

The husband being the head of the family and residing with the same is entitled to the exemption. The husband and wife may constitute a *family*. One person in the strict sense of the term can not constitute a family. *Race v. Oldridge*, 90 Ill. 250.

The statute requires that the husband must reside with his family, of which he is the head; but strictly speaking, where he and his wife alone constitute the family, he resides *with his wife*, not with the family, unless we can say he resides with himself as a part of the family; but persons always reside with themselves.

This would prove too much; for if the husband was compelled to reside with a family as the head, consisting of others beside his wife, he could never claim the exemptions allowed under the statute unless there were members of the family other than himself and wife. The true rendering of the statute, when applied to a case like this, would seem to be, that, in case a husband lives in the family relation with his wife, and is the head of the family consisting of himself and wife, he shall be entitled to the specified exemptions, and

in case he dies, deserts, or does not reside with his wife as a part of the family, then she, the remaining member of the family, after being deserted or left a widow, shall be entitled to the exemptions out of her husband's property that the husband would be if living with her. Neither the husband after he shall desert, nor his administrator or heirs after his death, is entitled to the exemption. So the creditor can be put in no worse condition by extending the provisions of the statute in case of death or desertion, to the wife, in a case like this.

We can see no good reason for excluding the wife, where there is no other member of the family, from the benefits of the statute, unless it should appear plain that such was the intention of the legislature from the language used. We think the statute should not receive the construction contended for by the appellant. It should receive a liberal and not a strict construction. To construe it as contended for by appellant would be to give it an illiberal and technical construction not warranted by the reading or the general policy of the legislature. We may draw some light from the policy of the legislature in another branch of exemptions—that of homesteads.

Such statute had the same object in view as the present one in regard to exemptions of personalty. That is, the humane object of protecting the weak and unfortunate. The homestead act, now a part of the general act on exemptions, provides—Sec. 2, Chap. 52:

“Such exemption (the homestead) shall continue after the death of such householder for the benefit of the husband or wife surviving, so long as he or she shall continue to occupy such homestead.”

The Supreme Court in giving that statute a construction said: “A widow without children is as much entitled to retain the homestead of her husband as one with children, for she may occupy it herself with servants, or alone if she chooses.” *White v. Plummer*, 96 Ill. 394. The opinion went so far in favor of the wife in giving a construction to the statute in regard to her “occupation of it,” under the statute, that three of the judges dissented.

Taking into consideration the liberality of the legislature and the courts in ameliorating the condition of the debtor class and their dependents, is it likely that the legislature meant by the language used to exclude the wife from the benefit of the exemptions of personal property allowed to the husband and his deserted family, where the family consisted alone of himself and wife?

We think no such exception was intended, and hold that the wife was entitled to the exemption.

We do not think the second point is well taken. We do not think the sale of the goods to Lewright was fraudulent. It is true the sale was made prior to the levy and the goods taken back after the levy. But the goods sold did not amount to \$400, and in fact the whole amount left by her husband did not amount to that sum. We can not see how there could be any fraud in making the sale, as none of the goods were subject to the attachment in case appellee desired to claim them. *Green v. Marks*, 25 Ill. 223; *Ives v. Mills*, 37 Ill. 75; *Bliss v. Clark*, 39 Ill. 590.

Nor do we think that the new statute that requires scheduling before exemptions can be claimed, has the effect to change the doctrine announced in the above cases. The appellee had a right to annul the sale made to Lewright after the property was levied on as the property of her husband and herself. We can not see how appellant was injured by that act, especially where there was no attempted fraud.

We also think the third point not well taken. The schedule appeared to be in proper form, although it might have been more specific in stating what particular property belonged to her, and what to her husband. She was entitled to \$400, as the deserted wife of her husband, out of the property he left, even if she had no property of her own; but if she had a hundred dollars worth of her own she was entitled to exemption as to that as a common debtor; but she could not take both. The \$100 worth of property was given her by appellant, so that portion was satisfied.

She demanded, under the schedule, \$300 more. The officer well understood that she claimed that, under the provisions of

the statute allowing her this out of the property of her husband left by him when he deserted her, and the schedule was sufficiently formal.

The point is made that the schedule did not contain all the property of the husband. We think it did substantially. The property mortgaged to Marlatt had been foreclosed by his taking possession before the levy and schedule under the chattel mortgage.

It was not more than enough to pay the mortgage debt. Even if some property had been omitted from the schedule we do not think that appellee's right to claim the property scheduled was forfeited.

The statute allows all property not scheduled to be levied on and sold—not that named in the schedule and claimed. *Austin v. Sevauk*, 9 Ind. 109; *Megehe v. Draper*, 21 Mo. 510; *Douch v. Rahner*, 61 Ind. 64, *State v. Reed*, 94 Ind. 103; *Blair v. Parker*, 4 Ill. App. 409; *Elder v. Williams*, 16 Nev. 416; *Hearth v. Keyes*, 35 Wis. 668.

Upon the whole we think the case was fairly tried. Seeing no error, the judgment is affirmed.

Judgment affirmed.

F. O. CUNNINGHAM ET AL.

V.

PATRICK THORNTON.

Bill to Reform and Foreclose Trust Deed—Misdescription—Subsequent Conveyances—Constructive Notice of Previous Conveyances—Evidence.

1. Such conveyances of record as are in the apparent chain of title to real estate, are alone required to be noticed by subsequent purchasers and incumbrancers.

2. In order to help out a defective description the law will not allow the false description to be rejected and the correct one inserted.

[Opinion filed May 28, 1888.]

28	58
86	111
28	58
187	380
187	382

Cunningham v. Thornton.

APPEAL from the Circuit Court of Peoria County;—the Hon. T. M. SHAW, Judge, presiding.

The facts presented by this record are as follows: Alvah Moffit and wife, on May 24, 1867, conveyed, by warranty deed to John Thornton, for the consideration of \$400, the following described parcel of land, to wit: "A part of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of Sec. 13, town 8, N. of R. 7, E. of 4th P. M.; beginning at the N. W. corner of said tract, thence S. 830 feet, thence E. 140 feet, thence E. 66 feet across the railroad track, thence S. on the east side of said railroad land 930 feet to the bank of the Kickapoo creek, thence N. 82 degrees E. 400 feet, thence N. 72 degrees E. 420 feet, thence N. 18 degrees W. 370 feet, thence N. 320 feet, thence N. 50 degrees W. 370 feet, thence N. 10 degrees E. 200 feet to the north line of said tract, thence W. 250 feet to the place of beginning, being 15 acres, more or less, excepting a certain right of way and coal." This deed was placed of record on the date of its execution. On the 14th day of August, 1875, John Thornton and wife executed a trust deed to Thomas McGrath, trustee, to secure a note held by Patrick Thornton of that date for the sum of \$386, due in three years, at the rate of ten per cent. interest per annum; said trust deed conveyed the tract of land described in the deed from Alvah Moffit, of the date of May 24, 1867, by the following description, to wit: "A part of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of Sec. 13, township 8, N. of R. 7, E. of the 4th P. M., in said township, county and State. For further description by metes and bounds, reference is had to a deed from Alvah Moffit and wife to John Thornton, which deed bears date May 24, 1867, and recorded in recorder's office of Peoria county, Illinois, in book B C of deeds, at page 146, except the same as provided in the above deed." This trust deed was filed of record the day it bears date.

On the 25th day of April, 1878, John Thornton obtains another deed from Alvah Moffit conveying to him the following tract of land for the express consideration of \$400 by the following description, to wit:

"A part of the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of Sec. 13, township 8,

N. of R. 7, E. of the 4th P. M., beginning at the N. W. corner of said tract, thence S. 830 feet, thence E. 140 feet, thence E. 66 feet across the C., B. & Q. R. R. track, thence S. on the east side of the said railroad land 930 feet to the bank of the Kickapoo creek, thence N. 82 degrees E. 400 feet, thence N. 72 degrees E. 420 feet, thence N. 18 degrees W. 370 feet, thence N. 320 feet, thence N. 56 degrees W. 370 feet, thence N. 10 degrees E. 200 feet to the north line of said tract, thence west 250 feet to the place of beginning, being 15 acres, more or less, excepting a certain right of way and coal." This deed contains the following recital: "This deed is made to rectify a deed made between the parties hereto on May 24, 1867, and recorded same date in recorder's office of Peoria county, Illinois, in book B C on page 146." This deed was recorded June 7, 1878. Subsequent to the recording of these several conveyances John Thornton borrowed money of appellant Cunningham at three different times, amounting in all to \$300. The first loan was made June 16, 1880, for the sum of \$150, for which a trust deed and note were given of that date.

The second loan was made April 30, 1883, for \$100, for which a trust deed and note were given of that date. The third loan was made May 2, 1884, for \$50, for which a mortgage and note were given of that date. These instruments were filed of record on the days they bear date respectively. These notes bear interest at the rate of eight per cent. per annum, and are owned by appellant Cunningham. These trust deeds and the mortgage conveyed the following tract of land, to wit: "A part of the E. $\frac{1}{4}$ of the *northwest quarter* of Sec. 13, township 8, north of range 7, east of the 4th P. M., beginning at the northwest corner of said tract, thence S. 830 feet, thence E. 140 feet, thence E. 66 feet across the C., B. & Q. railroad track, thence S. by the eastside of the said railroad land 930 feet to the bank of the Kickapoo creek, thence N. 82 degrees E. 400 feet, thence N. 72 degrees E. 420 feet, thence N. 18 degrees W. 370 feet, thence N. 320 feet, thence N. 56 degrees W. 370 feet, thence N. 10 degrees E. 200 feet to the north line of said tract, thence W. 250 feet to the place of beginning, containing 15 acres, more or less, excepting a certain right of

way and coal," etc., "being the same tract of land on which John Thornton resides, and described in the deed from Alvah Moffit to John Thornton, of date April 25, 1878.

On November 20, 1884, John and Mary Thornton, to secure their joint notes of that date for the sum of \$175, executed a mortgage to S. S. Page upon the same land, by the same description as covered by appellant Cunningham's trust deeds and mortgage. This mortgage was recorded November 20, 1884.

By stipulation this case is dismissed as to S. S. Page and Geo. T. Page is substituted as a defendant.

This bill was filed by the appellee to reform and foreclose the trust deed given by John Thornton and wife to Thomas McGrath, trustee, to secure the appellee in the sum of \$386, secured by said trust deed and note to appellee for that sum, and bearing date as above stated, August 14, 1875, and recorded same day.

The court below held that the said last named trust deed to appellee had priority over the various trust deeds and mortgages of the appellants, and decreed that the payment of the latter trust deeds and mortgages be postponed to that of appellee.

Messrs. W. T. WHITING and J. A. CAMERON, for appellants.

The beginning point established by the parties in their deed of conveyance is vital and can not be rejected, and controls the other calls in the deed; and if the land can not be located without abandoning this point the deed is void for uncertainty. *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65; *Dale v. Travelers Ins. Co.*, 89 Ind. 473; *Dwight v. Tyler et al.*, 49 Mich. 614; *LeFranc v. Richmond*, 5 Sawyer, 601.

The deed from Alvah Moffit to John Thornton dated May 24, 1867, not describing the land intended to be conveyed, is void for uncertainty, and appellee, having followed the same description in his trust deed, it is also void as to the rights and interests of third parties without actual notice or knowledge of the existence of said trust deed, and the recording of it is not constructive notice to appellants of appellee's interest

in the land, covered by their trust deeds and mortgages. *Rogers v. Kavanagh*, 24 Ill. 583; *Bowen v. Calloway*, 98 Ill. 41; *Chamberlain v. Bell*, 7 Cal. 292; *Lacey & Hoagland v. Simpson*, 11 N. J. Eq. 246; *Sanger v. Craigue*, 10 Vt. 555; *Frost et al. v. Beekman*, 1 John. Ch. 288.

As far as the legal title to the premises is shown by the chain of title of record, it is perfect in John Thornton, subject only to the liens of appellants. They were only required to search the records in the apparent chain of title to the tract of land covered by their trust deeds and mortgages. *Grundier v. Reid et al.*, 107 Ill. 304; *Irish et al. v. Sharp et al.*, 89 Ill. 261; *Bent v. Coleman et al.*, 89 Ill. 364; *Manley v. Pettee*, 38 Ill. 128; *Bowen v. Galloway*, 98 Ill. 41; *Wade on Notice*, Sec. 205; *Wait et al. v. Smith et al.*, 92 Ill. 385; *Carbine v. Pringle*, 90 Ill. 302; *Dexter v. Harris*, 2 Mason, 531.

In all the adjudged cases, the recitals or references in the deeds or wills which were held to be sufficient notice of the rights of third parties, were an express and direct recital of the equitable rights sought to be established, or a reference to some other deed which expressly stated the rights in such a manner that the purchaser could not, without negligence, avoid noticing. *White v. Kirby*, 42 Ill. 510; *Kerfoot v. Cronin*, 105 Ill. 609; *U. S. Mort. Co. v. Gross et al.*, 93 Ill. 483; *C., R. I. & P. R. R. Co. v. Kennedy et al.*, 70 Ill. 350; *Executors of Gale v. Morris*, 29 N. J. Eq. 222; *Hull v. Davis*, 36 N. H. 569; *Colcord v. Alexander*, 67 Ill. 581; *City of Chicago v. Witt*, 75 Ill. 211.

The rule of law to be deduced from the adjudged cases is: That when knowledge is imputed to a person by mere force of law without evidence of actual knowledge, he can only be held to know what the record to his chain of title shows, and not to know what it does not show. *Gale v. Morris*, 29 N. J. Eq. 222; *Wilson v. King*, 27 N. J. Eq. 374; *Carbine v. Pringle*, 90 Ill. 302.

The doctrine that the recording of the equitable trust deed of appellee is not constructive notice to appellants, for which we are contending as applicable to the case at bar, is fully

recognized by the following decisions: *Irish et al. v. Sharp*, 89 Ill. 261; *Manley v. Pettee*, 38 Ill. 128; *St. John v. Conger*, 40 Ill. 535; *Harris v. McIntyre et al.*, 118 Ill. 275; *Halstead v. Bank of Ky.*, 4 J. J. Marshall, 555; *Lessee of Heister v. Fortner*, 2 Binney, 40; *Calder v. Chapman*, 52 Pa. St. 359; *Frost et al. v. Beekman*, 1 Johns. Ch. 288–300; *Farmer's Loan and Trust Co. v. Maltby*, 8 Paige, 361.

Mr. DAN. F. RAUM, for appellee.

The record of an instrument conveying an equitable interest of any kind in real estate, is notice to the same extent as a deed conveying the legal title. *Snapp et al. v. Pierce et al.*, 24 Ill. 156; *Powell et al. v. Jeffries et al.*, 4 Scam. 387; *Doyle et al. v. Teas et al.*, 4 Scam. 202.

Purchasers and incumbrancers are chargeable with constructive notice of the recitals of all instruments in their chain of title. *Dwight v. Tyler et al.*, 49 Mich. 614; *Jones v. Williams*, 24 Beavan, 47; *Bellows v. Floyd*, 2 Watts, 409; *White v. Kirby*, 42 Ill. 510; *Crawford v. C., B. & Q. R. R. Co.*, 112 Ill. 314; *Sidwell v. Wheaton*, 114 Ill. 267.

Whenever a purchaser or incumbrancer has notice from the record that his grantor had been the equitable owner of the land before he obtained the legal title, then such purchaser or incumbrancer is chargeable with notice of all incumbrances of record made by his grantor after the date of the inception of his grantor's equitable ownership. *Irish et al. v. Sharp et al.*, 89 Ill. 261; *Hetzel v. Barber*, 69 N. Y. 1.

The recital in the deed of April 25, 1878, gave appellants notice of John Thornton's equitable ownership of the land in question from May 24, 1867, and was information sufficient to put a prudent man upon inquiry.

"A party, having notice of such facts as would put a prudent person upon inquiry, is chargeable with notice of other facts, to which, by diligent inquiry and investigation, he would have been led." *Bent v. Coleman*, 89 Ill. 364; *Doyle et al. v. Teas et al.*, 4 Scam. 248; *Rupert v. Mark*, 15 Ill. 542; *Morrison v. Kelley*, 22 Ill. 610; *Babcock v. Lisk*, 57 Ill. 327; *Ogden v. Haven*, 24 Ill. 59; *Harper v. Ely*, 56 Ill. 179; *Parker*

v. Merritt, 105 Ill. 293; Citizens National Bank v. Dayton, 116 Ill. 258.

It has been uniformly held that if the deed calls for natural monuments, as well as describes the land by a reference to the number of township, section and fraction of a section, in accordance with the general rule that natural monuments will control both artificial monuments and the courses and distances, the boundaries would be determined by the natural monuments, although the plats and field notes would indicate a different location. *Montgomery v. Johnson*, 31 Ark. 74; *Brown v. Huger*, 21 How. 305; *McIver v. Walker*, 4 Wheat. 444; *Newsom v. Prior*, 7 Wheat. 7; *Shelton v. Maupin*, 16 Mo. 124; *Duren v. Presberry*, 25 Texas, 512; *Dwight v. Tyler et al.*, 49 Mich. 614.

LACEY, J. The only question raised by this record is as to the priority of the various incumbrances of the appellants and the appellee.

It is admitted by appellee in his brief that "the evidence does not show appellants had any actual knowledge of the trust deed of appellee at the time they took their several trust deeds and mortgages." The only question, therefore, is whether the appellants, at the respective times when they took their several trust deeds and mortgages, were chargeable with constructive notice of the existence of the appellee's trust deed.

Two propositions are claimed on the part of the appellee, the correctness of either of which entitles him to priority. They are as follows: 1. The appellants are chargeable with constructive notice of appellee's trust deed, without regard to the sufficiency of the description in it to pass the title. 2. The original description in the first deed from Moffit to John Thornton, as well as that in appellee's trust deed which followed the first, was sufficient to convey title to the land in controversy, notwithstanding the error in it. These are the propositions upon which we are called on to pass, and the solution of which is decisive of the case.

Both appellants and appellee claim liens through John Thornton, who was the grantee of Alvah Moffit: the latter

through a deed misdescribing the land in question, following the supposed erroneous description in the first deed from Moffit to John Thornton, and the former, though conveyances subsequent in time and record to appellee's lien, through a supposed corrected description subsequent to the so-called corrected deed from Moffit to John Thornton. We will first pass on the question of the sufficiency of the description to pass the title. We can not regard the description in the deeds, mortgages and trust deeds, executed before the correction, as good. It is insisted by appellant that after rejecting the portion of the description that is false, there still remains enough, in view of the parol evidence, to locate the land on the proper tract; that is, the one intended by the grantor. We can not agree with this view. The land meant to be conveyed was in the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, Sec. 13; the starting point to measure it by metes and bounds was at the northwest corner of said tract. If the false portion, the "northeast quarter," be rejected, then the land would be located in the east half of the section. It would then read, "a part of the east half of section 13, beginning at the northwest corner of said tract," a quarter of a mile east of the true point. The true starting point would still not be found. If the entire description, "east half of the northeast," be disregarded, we then have no starting point except the "northwest corner of the tract," of fifteen acres. From this imperfect description the land could not with any certainty be located. There is no point marked or described on the railroad where the line in the third call for distance crosses it, nor is there any monument or point designated on the bank of "Kickapoo creek," where the fourth call for station is made. So, without the starting point, the land can not be located. In order to help out a defective description the law will not allow the false description to be rejected and the correct one inserted. This would be making a new description and changing the written description by parol evidence. This alone a court of chancery has the power to do. Words are not allowed to be inserted even to help out a description in a will, in order to give effect to the intention of a testator, where courts are more liberal than

they are in regard to deeds, for deeds may be corrected in equity according to the intention of the grantor and grantee, but not so with wills. They must stand or fall by the description therein contained. Mistakes can not be corrected. *Decker v. Decker et al*, 121 Ill. 341; *Kurtz v. Hobner*, 55 Ill. 514; *Barven v. Allen*, 113 Ill. 53. "Parol evidence may be used to establish and identify the object of the call in the deed, and the grant will only be held void for uncertainty where, after resort to oral proof, it remains a matter of conjecture what was intended by the instrument." *Smith v. Crawford*, 81 Ill. 296. After hearing the parol evidence in this case, and if the starting point be rejected, it would still be a matter of conjecture where the land was located.

The next point is, were the appellants bound to take notice of the record of appellee's trust deed? We are of the opinion that they were not. On account of the misdescription in appellee's mortgage, it was not in the apparent chain of the title of the land in question. It did not describe it. The records did not show that the land in question had been conveyed by John Thornton at the time the appellants acquired the trust deeds and mortgage. The appellants would not be compelled to search the records to ascertain whether John Thornton had made some deed in which facts were recited by means of which, added to the knowledge they were compelled to have, *i. e.*, that John Thornton had held the land by misdescription for several years, the appellants would be put on inquiry. The law, we think, is well settled that such conveyances of record as are in the apparent chain of title are alone required to be noticed by subsequent purchasers and incumbrancers. *Crabtree v. Pringle*, 90 Ill. 302; *Wait et al. v. Smith*, 92 Ill. 385; *Rodgers v. Kavanaugh*, 24 Ill. 583; *Irish v. Sharp et al.*, 89 Ill. 261; *Dexter v. Harris*, 2 Mason, 531; *Manly v. Pettee*, 38 Ill. 128.

It would be most unreasonable to require appellants to search the records through and examine every deed executed by John Thornton subsequent to the time he had accepted the defective deed from Moffit in 1867, and read all such deeds to ascertain if he had not made some conveyance of this land

by a misdescription similar to the one contained in his deed from Moffit. All that the appellants were bound by law to take notice of was that Thornton had for some time held some kind of a claim on the land under a deed in which it was misdescribed, and that the deed had been corrected. Having this knowledge, if, as a matter of fact, appellants had seen the trust deed of appellee in which the land was similarly described, it would have been, as we think, good notice; but notice of such trust deed can not be inferred from the mere fact of its being of record. The case of *Dwight v. Taylor*, 49 Mich. 614, is not in point. In that case the court held there was no want of a legal description in the conveyance by the record by which all were bound. The observation of the judge writing the opinion, at its conclusion, that if the appellant had examined the record he would have been notified of appellee's title, was unnecessary to a decision of the case and was mere *obiter dictum*, the description being held to be good. Besides, the remark was correct, at all events, as to notice, the title being held legal. But if the opinion is to be understood to decide that even if the description had been bad, the subsequent grantee should be held to notice, we do not approve it, and think it not in harmony with the opinions of our own Supreme Court and other courts of high authority. It follows from what we have said that the court below erred in holding that appellee's trust deed had priority of lien over appellants' trust deeds and mortgages, and decreeing that the former should be first paid. Appellants' trust deeds and mortgages should have priority as to appellee's, and as to each other in the order of their record.

The decree of the court below is therefore reversed and the cause remanded to the court below, with directions to render decree in accordance with this opinion.

Reversed and remanded.

28	68
104	1312

ERNEST TREISHEL

V.

DAVID MCGILL.

Practice—Rules of Court—Bill of Exceptions—Motion to Strike from Record.

1. Rules of court entered of record become the law of procedure in matters to which they relate until they are rescinded or modified by order of court entered of record. Such rescission or modification can not be made by a judge in vacation.

2. Where the time in which to prepare and present a bill of exceptions, by order of the trial court entered of record, is extended to a day in vacation, under a rule of court providing that in such case the party preparing the bill shall give the opposite party a certain time within which to examine the original or a copy thereof, it is error on the part of the trial judge to sign the same until the full time has been accorded for such examination.

[Opinion filed June 22, 1888.]

APPEAL from the Circuit Court of Iroquois County; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. KAY & EUANS, for appellant.

Messrs. R. W. HILSCHER and T. B. HARRIS, for appellee.

Per Curiam. A motion was filed in this case by the appellee to strike the bill of exceptions filed herein from the record, and the causes assigned therefor are, first, that no bill of exceptions or copy thereof was served upon or left with appellee or his attorneys five days before the time of the presentation thereof to the trial judge for his signature, under "Rule 7" of the rules of practice, then in force in said trial court; and second, there was no waiver of such notice and copy, or of leaving the original bill with appellee or his attorneys, as required by said "Rule 7."

The facts, so far as deemed necessary for determination of the questions presented, appear by stipulation of counsel

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for the respective parties and filed in this cause, and in effect are as follows: That the time within which to prepare and present a bill of exceptions in this cause was, by the order of the trial court entered of record, extended to a day in vacation, and the time within which to present the same for allowance and signature of the trial judge under such order, expired January 31, 1888. That "Rule 7" of the rules of practice of the eleventh judicial circuit of this State was, at the time the judgment and order for said appeal were made, and still is, in full force and effect in the said county of Iroquois; that so much of said "Rule 7" as is deemed material to the case at bar, is as follows:

"In case the court shall in any case extend the time for preparing and presenting for signature a bill of exceptions to a day in vacation, on or before which such bill of exceptions may be presented for the signature of the judge, it shall be the duty of the party preparing such bill to give the opposite party five days notice of the time and place of presenting such bill of exceptions, and he shall at the same time leave with the opposite party a copy of the proposed bill of exceptions, or shall allow the opposite party to take the original draft of such bill and retain the same for four days for examination, and no bill of exceptions shall be signed in vacation without satisfactory proof of such service of notice and copy, unless the opposite party shall waive, in writing, such notice and copy, or of leaving the original with the opposite party as aforesaid."

That on the evening of the 26th of January, 1888, a written notice of the time and place of presenting a bill of exceptions in said cause, was served by delivering a copy thereof to the defendant, appellee. That no bill of exceptions or copy thereof was left with such notice, and on the 28th of January, 1888, a copy of such notice was served on the attorney of appellee, stating the intended time and place of the presentation of said bill of exceptions to the trial judge for signature, and at the same time last above stated was left with said attorney for appellee the original bill of exceptions, and the same was allowed to remain with said attorney until the morning of January 31, 1888, at which time the attorneys for both appel-

lant and appellee appeared before the judge who tried said cause, and attorney for appellant presented the said bill of exceptions to said judge for allowance and signature.

The evidence on the trial of said cause was taken in shorthand by the official court reporter; no application was made to said reporter by appellant to transcribe said testimony until the evening of January 21, 1888, and owing to the intoxicated condition of the reporter the appellant was unable to obtain a transcript of such testimony and complete his bill of exceptions until the 28th day of January, 1888, and but for such condition of the reporter the testimony could and would have been obtained, and said bill of exceptions completed and delivered, or a copy thereof, to attorneys of appellee, on the 26th day of January, 1888, and in time to comply with the "Rule 7" of said court above set forth.

At the time of presenting said bill of exceptions to the trial judge, as before stated, the foregoing facts were made to appear, and attorney for appellee objected to the allowance or signing thereof for the causes assigned in his motion, filed in this cause, but the same was overruled and the bill of exceptions signed and sealed by the trial judge, and the same was filed in this court as part of the record in this cause. Under the facts as stated, ought the motion of appellee to prevail?

In *The People v. Blades*, 104 Ill. 591, it was held, where a standing rule of the "trial court required the party obtaining an extension of time for preparing a bill of exceptions to a day in vacation to give the adverse party five days notice of the time and place of presenting the bill to the trial judge, and at the same time leave with the opposite party a copy of the bill, or allow him (the opposite party) to take and retain the original draft four days for examination, unless rescinded or modified and entered of record, the rule must stand, and any order giving time within which to prepare and file bills of exceptions must be construed with reference to such rule." In that case the court say it was purely discretionary with the trial court to enter such order or not; necessarily, therefore, in the exercise of that discretion no one had a right to object to the terms and conditions imposed.

Treishel v. McGill.

“The parties’ condition is no worse than it would have been had the sickness of the reporter occurred, and from that cause the inability to procure a transcript of his notes until beyond the time set for signing the bill of exceptions. We do not regard it as a subject for us to inquire into whether it would be equitable or inequitable to disregard the rule under the circumstances shown. There must be a limit to the time within which to present bills of exceptions for signatures of judges, and it is most reasonable that opposite counsel should have previous opportunity to examine the bill.”

In *Hake v. Strubel*, 121 Ill. 321, the bill of exceptions appearing in the record was not presented to the trial judge nor signed nor sealed by him within the time named in the order granting the appeal. Upon the record being taken to the Appellate Court for the Fourth District, on motion of appellee the bill of exceptions was there stricken from the record and the judgment of the Circuit Court affirmed. On petition of appellant the cause was, by the Appellate Court, certified to the Supreme Court, and the question there submitted was whether a circuit judge, in vacation, under the facts of that case, had the power to extend the time for presenting and filing such bill of exceptions beyond the time fixed by the court when granting the appeal, and still make such bill a part of the record. It was there held, after a careful examination, “that after the time for presenting the bill fixed in the order of appeal had expired, the trial judge was powerless to act in the premises, and that he could not be vested with requisite power to settle and allow a bill of exceptions by the consent or agreement of the parties, and the judgment of the Appellate Court was affirmed.”

In *The People ex rel. v. Kirk Hawes*, 25 Ill. App. 326, which was a proceeding by *mandamus* to compel the respondent, one of the judges of the Superior Court of Cook County, to sign and seal a bill of exceptions, the Appellate Court of the First District, speaking of the power of a circuit judge in vacation to extend the time for presenting and filing a bill of exceptions beyond the time fixed by the court at the term in which judgment was entered and still make such bill of ex-

ceptions a part of the record, say: "It can not be and never has been pretended, so far as we know, that a judge in vacation, in the absence of express statutory authority, can interfere with or change the record of the court over which he presides. When the performance of particular duties in vacation are in conformity with recognized rules of practice committed to him, he may perform these duties according to and within the terms of the order, but he can not modify or enlarge the order, and thereby extend his power. The entry of orders in judicial proceedings are judicial acts and must be performed by the court and not by a judge in vacation. The order allowing the appeal fixing the amount of the bond and the time within which the bond and bill of exceptions in the cause shall be presented and filed, are judicial acts which can only be performed by the judge in term time and when sitting as a court; it follows of necessity, then, that the act of changing such order by entering another order extending the time in which the bill of exceptions might be presented should and must be of the same judicial character, an exercise of judicial power and could not be performed by a judge except in term time."

By the 74th section of Chap. 37, title, "Courts," it is provided that said courts (Circuit and Superior) may from time to time make all such rules for the orderly disposition of business before them as may be deemed expedient, consistent with law.

It will be observed that such rules are required to be made by the *courts* and not by the judges in vacation, and as we have seen, both upon principle and authority, when such rules are entered of record in such courts the same become the law of procedure therein, in matters to which the same relate, until rescinded or modified, and entered of record in such court, and that such rescission or modification could not be made by a judge in vacation.

The rule in question being the law of the court, the order granting time to sign the bill of exceptions in vacation must be regarded as made with reference to the rule of court, and the rule taken as a part of the order. The judge would have no discretion or power in vacation to depart from the term of

the order or rule. Hence the signing of the bill of exceptions without compliance with the rule was an act of the judge without legal authority. The cases cited above, we think, clearly establish that doctrine.

The motion of appellee is allowed and the said bill of exceptions will be stricken from the record.

ILLINOIS CENTRAL RAILROAD COMPANY

V.

BELFORD SLATER, ADM'R.

Personal Injuries—Railroads—Collision at Highway Crossing—Death of Child—Action for Damages—Questions for Jury—Negligence of Parent—Evidence—Res Gestæ.

1. It seems that a failure to look in the direction from which a train is expected, upon approaching a railroad crossing, if such train would be visible to a person so looking, will defeat a recovery for injuries suffered by him from the train in question, although the bell was not rung nor the whistle sounded.

2. It is not negligence in a parent to send minor sons of nine and thirteen years with a gentle team upon an errand which requires them to cross a railroad track at an established crossing.

3. Evidence as to the speed of the train at the time of the accident is admissible as part of the *res gestæ*.

4. The question of damages for causing the death of a child rests in the sound discretion of the jury. In the case presented, a verdict for \$1,000 is sustained.

5. Evidence as to the financial standing of the father, who sues as administrator for the use of the next of kin, is inadmissible.

[Opinion filed July 16, 1888.]

APPEAL from the Circuit Court of Ogle County; the Hon. C. W. UPTON, Judge, presiding.

Messrs. W. & W. D. BARGE, for appellant.

Messrs. JAMES H. CARTWRIGHT and J. W. ALLABEN, for appellee.

C. B. SMITH, J. Arthur B. Slater and Lewis Slater, brothers, and the children of Belford Slater, were both struck and killed on the 24th of August, 1886, by a locomotive engine drawing a passenger train on appellant's road near Polo at Brand's crossing. Arthur was about nine years old and Lewis about thirteen when they were killed. On the morning of the day of the accident, Belford Slater, the father, sent the two boys to Polo, something over a mile distant from home, with a team and wagon, to get a barrel of buttermilk from the creamery. Arthur had been going to school, but on that day had a sore foot and could not go and was allowed to accompany his brother Lewis on the errand to the village. They did the errand and about eleven o'clock were returning home and reached Brand's crossing at about the time the passenger train was due at the crossing and in crossing the track the wagon in which the boys were riding was struck by the engine drawing the train and the boys both instantly killed. This suit is brought by the father as administrator of Arthur B. Slater for the use of the next of kin.

There are three counts in the declaration. The first charges the defendant with negligently running its train at a high and dangerous rate of speed and with failing to keep a proper watch for persons about to cross the track and with failing to give such signal as would warn persons of the approach of the train and with a failure to stop or to endeavor to stop the train after the danger was apparent. The second count charges negligence in doing or not doing some one of these things named in the first count.

The third count charges the negligence of the company to consist in not ringing a bell of thirty pounds weight or blowing a whistle at least eighty rods before reaching the crossing and in not keeping the bell ringing or the whistle blowing continuously until the crossing was reached, and that by reason of such failure the deceased, in the exercise of due care, failed to hear or see the approaching train, and without his fault was

killed. All the counts aver the deceased was in the exercise of due care and caution.

The plea was the general issue. The only controverted question of fact was as to whether defendant and deceased, one or both, were guilty of negligence, and the degree of that negligence. The proof shows or tends to show that the train was perhaps five minutes late at the crossing and that it was running at the rate of speed of about forty miles an hour at the time. There is a good deal of conflict in the testimony as to what, if any, obstructions there were in the immediate vicinity of the crossing in the direction from which the train was coming which would or would not obstruct the view of persons approaching the crossing, so as to prevent a person on the watch (using care) to see the approaching train. According to appellee's witnesses the obstructions were many and serious and would be likely to prevent any person seeing the approach of the train until they were on or very near the right of way. According to appellant's witnesses any person using ordinary care would have no trouble, if he looked, to see the approaching train at least two miles. The evidence satisfies us that there were a good many obstructions along the sides of the right of way and near it, consisting of trees and osage and willow hedge, orchards, cribs and sheds, such as to seriously interrupt the vision. The accident occurred, too, at a time when the trees were in full leaf. The train was running on a down grade until very near the crossing and making less noise from the escape of steam and the exhaust and labor of the engine than it would on a level or up grade. Appellant has taken great pains and called many witnesses to satisfy the jury and court that the obstructions were not such as to obstruct the view of a careful and watchful person. Many photographs have been taken at different positions on the wagon road and showing a view of the track and train at different points above the crossing in the direction from which the train came on the day of the accident. Witnesses also testify that, standing at different points on the road near the crossing where the boy lost his life and over which the wagon passed immediately prior to the accident, they could

see the track for nearly or quite two miles. The proof discloses that many of these photographs and these observations were taken in December when the foliage was all gone. The camera, also, was much lower than the boys sitting on the top of the wagon and would be very likely to miss obstructions among trees which would meet the eye of a person sitting on top of a wagon when the trees were in full leaf.

What the nature and extent of these obstructions were and how much, if any, they would interrupt the view of persons approaching the track, was one of the controverted facts in the case and seems to have been fairly submitted to the jury. That these obstructions existed, cutting off the view from the road, receives support from the engineer himself. He swears that he was on his seat at his proper place and looking forward as he approached the crossing; that the windows in the cab were open, that he blew the whistle at the whistling post but saw no teams until he was within twenty-five or thirty rods of the team, and that the team was then just on the right of way about fifty feet from the track. The opportunity for the engineer to see the approaching team from his elevated seat was fully as good as that of the boys in the wagon to see the approaching train. Approaching the track was one of the controverted facts in the case and was fairly and fully submitted to the jury. If there were sufficient openings in the direction from which the train was coming to enable the deceased to see the train if he had looked on approaching the track, and he failed to look, then such failure to look would be such negligence as would defeat a recovery, and in that view of the case it would make no difference whether the defendant rang a bell or sounded a whistle or not; but if, on the contrary, these obstructions were of such a character as to prevent the deceased and his brother, in the exercise of proper and reasonable care and caution, from seeing the train coming in time to save themselves, then it becomes a very important and material question of fact whether the defendant rang the bell or sounded the whistle as required by law, or for such reasonable length of time as would give persons approaching the track warning of danger so that they might keep off the crossing until the train passed.

As to whether or not the defendant rang the bell or sounded the whistle for the distance of eighty rods, there is also great contradiction in the record. All admit that the danger signal was given by the engineer shortly before striking the wagon. Many witnesses swear that, being near enough to hear the bell or the sound of the whistle, they heard nothing until the danger signal was sounded close to the crossing. On the contrary, many, and perhaps more, witnesses testify for the defendant, that the whistle was sounded for the crossing, and that the bell was rung until the crossing was reached. The proof tends to show (and it is not contradicted) that these boys were accustomed to driving and handling these and other horses and driving the teams by themselves, and that they were competent to do so under ordinary circumstances, and that this was a gentle and quiet team. We do not think the father was guilty of such negligence (even if any want of care can be attributed to him) in allowing his sons to go on the errand on that fatal day as would prevent his recovery on that ground. Children, if not too young, have a right to go on the public highways, and parents may send them upon reasonable errands without forfeiting their right to the ordinary protection which the law guarantees to adults under like circumstances.

After a careful consideration of the evidence in this record, we can not say that the verdict of the jury is so manifestly against the weight of the evidence as to require our intervention to set it aside.

We can see nothing in the record which would probably produce a different result on another trial. If, under the facts, appellee was entitled to recover, the amount of the verdict is not unreasonable. We think there is nothing in the objection that the damages are excessive. The Supreme Court of this State have decided so often that the question of damages in cases of this kind rests in the sound discretion and judgment of the jury that we do not deem it necessary to discuss it or cite authorities in its support.

It is also objected that the court erred in allowing the speed of the train to be shown. This was clearly right. It was a part of the *res gestæ*.

It is also objected that the court erred in refusing to allow appellant to prove the financial condition of appellee. We are unable to see the force of this objection, either for the purpose of showing a want of care on the part of appellee or for the purpose of mitigating damages or defeating the action.

The next objection urged is that the court erred in giving and refusing instructions. Six instructions were asked and given on motion of the plaintiff. We think they fully and correctly state the law of the case and are not open to the criticism made against them. The appellant submitted and asked the court to give thirty-four instructions to the jury on its part. The court refused nine, modified three, and gave the remaining twenty-two as requested. In these twenty-two instructions given as asked, and the three given as modified, we think every legal right of the appellant was fully and clearly given to the jury and that it can have no right to complain on the ground of instruction. We see no error in this record and the judgment is affirmed.

Judgment affirmed.

Judge UPTON, having tried this case in the court below, took no part in the decision.

ERNEST TREISHEL

V.

DAVID MCGILL.

Practice—Presumption.

In the absence of a bill of exceptions the presumptions as to matters dehors the record are in favor of the verdict and judgment.

[Opinion filed July 20, 1888.]

APPEAL from the Circuit Court of Iroquois County; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. KAY & EUANS, for appellant.

P. & P. U. Ry. Co. v. U. S. Rolling Stock Co.

Messrs. R. W. HILSCHER and T. B. HARRIS, for appellee.

Per Curiam. In this case, on motion, the bill of exceptions was stricken from the record by order of this court. [*Ante*, p. 68.] The errors assigned and the points argued by counsel for appellant raise questions of law and suggest reasons for reversal alone based on the evidence and instructions and matters *dehors* the record, taking place at the trial.

As there is now no bill of exceptions in the record, we are unable to determine whether those points are well taken or not. The presumptions are in favor of the verdict and judgment.

Judgment affirmed.

28 79
160 247

PEORIA & PEKIN UNION RY. CO.

V.

THE UNITED STATES ROLLING STOCK CO. ET AL.

Carriers—Destruction of Leased Cars by Fire—Action against Carrier—Parties—Statute of Limitations.

In an action by a rolling stock company against a railroad company engaged in the general business of switching cars, to recover the value of several leased cars which were destroyed in the same conflagration, said cars having been switched at different dates, it is *held*: That if the plaintiff has a cause of action, it has a separate one for each car; that the fact that the declaration was amended after the cause of action was barred as to one of the cars, so as to include such car and to make appellees parties plaintiff, did not have the effect to revive the claim as to said car; that the owner of the cars was a proper party to bring the suit; and that such owner was in no way bound by contracts existing between the defendant and its lessees.

[Opinion filed July 20, 1888.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Suit in assumpsit was instituted at the October term, A. D.

1884, in an action on the case by the Chicago, Saint Louis and Western R. R. Co., for the use of the appellees, to recover the value of three of the four cars which form the basis of the present case.

At the February term, 1887, by leave of court before that time granted, an amended declaration was filed, in which the Chicago, Pekin and Southwestern R. R. Co. was made plaintiff, for the use of the appellees, declaring for the value of all four cars, and at the same term another amended declaration was filed by leave of court, in which the appellees, for whose use the case had been originally brought, were made plaintiffs.

A fair statement of the principal facts involved in the case as presented to the trial court, can be gathered from the stipulation submitted by both parties, and material part of the lease referred to in the fourth clause of the stipulation as "Exhibit 1." The stipulation is as follows, viz.:

"In order to expedite the trial of this cause, the attorneys for the respective parties thereto have this day agreed upon the following for submission to the court, viz.:

"1. That the plaintiffs were duly incorporated and were the owners of the cars, the value of which is sought to be recovered in this suit, but they were not interested in the contents, taken to the sugar refinery hereinafter mentioned.

"2. That the Chicago, Pekin and Southwestern Railway Company was a corporation having a railway from Chicago to Pekin in this State, but at the time of the destruction by fire of said cars, as hereinafter mentioned, and for some time prior thereto and thereafter, its property was in the hands of one S. B. Reed, receiver of said company, by order of the United States Court at Chicago, who was managing and operating the property of said company, and was also using the tracks of said defendant between the cities of Peoria and Pekin, and also its tracks at Peoria, under a lease hereinafter mentioned, and that said Reed remained in the management and operation of the property of said Chicago, Pekin and Southwestern Railway Company, and of the privileges under said lease, until on or about the 5th day of January A. D. 1883.

“3. The defendant is, and has been, a railway corporation since the first day of October, 1880, with tracks running on both sides of the Illinois river between the cities of Peoria and Pekin, Illinois, and is also engaged in a large switching and terminal business in both said cities, having what are known as railroad yards for that purpose in Peoria, and that the Peoria Sugar Refinery was located alongside of two of its tracks in Peoria, which were used for switching cars to and from said refinery.

“4. That said Reed, as receiver of the Chicago, Pekin and Southwestern Ry. Co., was a lessee of the defendant, the Peoria and Pekin Union Ry. Co., under the terms and conditions of a lease similar to the one herein filed, marked ‘Exhibit 1,’ and made a part of this stipulation.

“5. That said receiver, under said lease or contract, with his own men and motive power, brought the cars (afterward destroyed by fire, viz., Nos. 4145, 3829, 3839, 3043, but then in his possession,) from the city of Pekin, Illinois, to the city of Peoria, upon the tracks of defendant, in September and October, 1881, and placed them on other tracks or switches of said defendant in the city of Peoria; that afterward while the cars were on the tracks or switches as left by said receiver, Ira W. Gantt, the agent of said receiver, acting under the terms of said lease or contract, directed the defendant to switch said cars to said sugar refinery for the purpose of being unloaded, car No. 3043 being ordered so switched on September 12, 1881, car No. 4145 on September 27, 1881, car No. 3829 on October 10, 1881, and car No. 3849 on October 20, 1881; that said defendant by reason of such direction, and as provided in said lease or contract, and acting under it, switched said cars to said sugar refinery and left them standing upon a track at said refinery owned by said defendant, but embraced in said lease or contract with said receiver; that about noon of October 27, 1881, said sugar refinery and said cars were destroyed by fire, which was not in any way caused by defendant, or through its fault or negligence; that in handling said cars the said receiver and his agents, and the said defendant, acted under, and because of said lease or contract.

"6. That David W. Rider, whose deposition is herewith to be read on trial, on behalf of defendant, was, at the time of said fire, the superintendent of the Peoria and Pekin Union Ry. Co.

"7. That the deposition of Ira W. Gantt, herewith filed, is to be read on the trial on behalf of plaintiff.

"8. That the defendant does not, by this stipulation, waive any of its pleas filed in this cause May 4, 1887.

"9. If the court finds that the defendant is liable to the plaintiffs for the loss of said four cars, then it is further stipulated as a basis for their value, that the cars were worth as follows, viz.: No. 4145, \$450; No. 3829, \$485.98; No. 4839, \$460; No. 3043, \$475."

The clauses in the lease are as follows:

"And this indenture further witnesseth, that said party of the first part hath let, leased and demised, and by these presents doth let, lease and demise, unto the said party of the second, third, fourth and fifth parts respectively, their successors and assigns, all and singular its said main tracks, side tracks, switches, turnouts, connecting track, round-houses, freight houses, passenger depots and all its terminal facilities in the said cities of Peoria and Pekin, whether the said described premises are now owned or held by said first party or shall be hereafter acquired.

"To have and to hold, under the terms, provisions, stipulations, limitations and conditions, for the use and enjoyment thereof herein contained, unto the said parties of the second, third, fourth and fifth parts respectively, and their successors and assigns, severally and equally, as tenants in common, for and during the full term and period of fifty years from and after the — day of — A. D. 1881, and renewable from time to time for like periods forever, on the same terms, provisions, stipulations, limitations and conditions, subject to the earlier determination of this lease as hereinafter provided, but not exclusively however, the said party of the first part hereby expressly reserving unto itself the full right and power to make contracts for the use and enjoyment of said demised premises by other railroad companies doing business at the said city of

P. & P. U. Ry. Co. v. U. S. Rolling Stock Co.

Peoria or desiring to do so; the said lessees to take, use, occupy and enjoy said demised premises in the manner following and not otherwise, that is to say:

“*First.*—The said lessees shall severally have the right to the common use and enjoyment of all the main tracks, aforesaid, of the said cities of Pekin and Peoria, and the necessary side tracks for passing trains, in running their trains of every class over the same or any part thereof, with their own engines and employes, between Pekin and Peoria, and for the purpose of delivering and receiving their trains and cars to and from the party of the first part, and to and from the said union passenger depot.

“*Second.*—The said lessees shall severally have the right to use the said round-house or houses, together with the necessary approaches thereto, for the care and shelter of their engines, and to use said turn-tables for the purpose of turning their engines and cars.

“*Third.*—The said lessees shall severally have the right to the use of the said freight house or houses, and of the proper tracks connecting therewith, for the purpose of loading and unloading freight, and also the use of the standing room provided for the loading and unloading of cars from or to wagons and drays, the first party to furnish the necessary labor therefor.

“*Fourth.*—The said lessees shall severally have the right to the use of all the transfer tracks, side tracks, switches and turnouts and other terminal facilities of the first party at the said cities of Peoria and Pekin, for the transfer of loaded and empty freight and other cars by the said first party from and to all freight houses and warehouses, packing houses, stock yards, grain elevators, distilleries, mills and other industries, and to and from the tracks and warehouses of other railroads, with any of which any of the tracks of the first party shall at any time be connected, whether such tracks, or any of them, shall be owned or held or in some other wise controlled by said first party, and the said party of the first part, for the consideration aforesaid, doth hereby covenant and agree promptly and efficiently, and without discrimination or partiality in

favor of any company or the business thereof, to make such transfers of the loaded and empty freight and other cars of the said lessees respectively, the said first party hereby reserving unto itself the right to make transfer of all companies and persons desiring such service, without prejudice, however, to the business of the said several lessees, and said first party shall also make up and deliver on the main track all freight trains, and at the union passenger depot all passenger trains of the said lessees respectively.

"Fifth.—The said lessees shall severally have the right to the use of the said union passenger depot, when the same shall be constructed, and the appurtenances and approaches thereto, and to run their passenger trains into and out of the said depot. But until the completion of the said union passenger depot, the said lessees shall severally have the use of convenient and suitable accommodations for their passenger trains to be furnished by the said first party, and they shall at all times have the use of sufficient, convenient and suitable standing room for their passenger, baggage and mail cars at said city of Peoria, while not in use, on tracks to be provided and set apart by said first party.

"Sixth.—The said lessees shall severally have equal rights and accommodations in the use and enjoyment of all elevators, stock yards and other property and facilities at any time acquired or controlled by said party of the first part. The said party of the first part reserving, however, unto itself, its successors and assigns, the rents, tolls, incomes and payments hereinafter provided to be paid by the said several lessees respectively.

"And in consideration of the premises and of the covenants herein contained, to be performed by said party of the first part, the said lessees respectively do hereby covenant and agree, each for itself and its successors, and not for the other, that during the continuance of this contract it will pay unto the said party of the first part and its successors, as rental for the said demised premises, and for the use and enjoyment thereof as herein provided for, in the manner following, that is to say:

“First.—The sum of \$22,500 per annum, to be paid in equal monthly installments during the continuance of this contract, the installment of each month to become due and payable on the fifteenth day of the succeeding month, and to be paid at the place where the quarterly installments of interest on the first mortgage bonds of the party of the first part shall be payable, and when so paid the same shall be held for the payment of the next accruing interest on said bonds, and to be so paid out and not otherwise.

“Second.—The said lessees shall also severally pay to the treasurer of the said party of the first part, at the city of Peoria, on the fifteenth of the succeeding month, or within ten days after a statement thereof shall be furnished by the said first party, their just proportion of the expenses incurred or paid during the preceding month by the party of the first part, for the maintenance, renewal and keeping in thorough repair and working condition the said main track and sidings, passenger depot, approaches and facilities, freight and round-house or houses, and all other property which shall be used by the said lessees in common with the said party of the first part, and of such other proper joint expenses and charges as shall accrue from the common use of said main tracks, depots, freight and round-houses and other property used in common, such just proportion to be fixed and determined by the number of wheels used and run by the said parties respectively on said main tracks, the said moneys to be paid by the said lessees respectively, to bear the same proportion to the whole amount of said expenses so to be incurred which the number of wheels used and run by the lessees respectively on the said main tracks shall bear to the whole number of wheels used and run on the said main track for the preceding calendar month. Provided, however, that it is expressly understood that the expense of maintenance, renewal and repair of all tracks lying within the yards of the first party at and near Peoria and Pekin, shall be borne and defrayed by the said first party at its own cost.

“Third.—After the completion of said union passenger depot the said lessees shall also severally pay, at the time and in the manner last aforesaid, or within ten days after a statement

thereof shall be furnished by said first party, such reasonable sum for each of their passenger, mail and baggage cars entering or leaving said passenger depot during the preceding calendar month, as shall be fixed by said first party, being an uniform rate per car, to be charged to all companies which shall run their passenger trains to and from the said depot without discrimination, which shall include the charges for making up trains.

“*Fourth.*—The said lessees shall also severally pay, at the time and in the manner last aforesaid, or within ten days after a statement thereof shall be furnished by the party of the first part, all such reasonable charges as shall be made by the party of the first part for the preceding calendar month, for the transfer service hereinbefore required to be done to and from connecting railroads, being an uniform rate per car, which shall have been previously fixed by said party of the first part, to be charged to all companies for such services without discrimination, and which shall approximate the actual cost of such service as nearly as possible, which shall include the charges for making up trains.

“*Fifth.*—The said lessees shall also severally pay, at the time and in the manner last aforesaid, or within ten days after a statement thereof shall be furnished by the party of the first part, all such reasonable charges as shall be made by the party of the first party for preceding calendar month for handling and switching their loaded and empty cars to and from freight houses, warehouses, packing houses, stock yards, grain elevators, distilleries, mills and other industries at the cities of Pekin and Peoria, being an uniform rate per car, which shall have been previously fixed by the said party of the first part, to be charged to all companies and persons for such service without discrimination, which shall include the charges for making up trains.”

It also appears from the evidence of Rider and Gantt that after the cars in question were delivered to the appellant to be switched to the sugar refinery, and after they were so switched and left on the track at said refinery, they were still under the control of appellants, waiting orders from the party deliver-

ing them, or some industry, to be reloaded, when they were to be returned to the parties delivering them.

To this cause of action the appellants filed a plea of the statute of limitations of five years, May 4, 1887.

Messrs. STEVENS, LEE & HORTON, for appellant.

It is assumed by appellees that the appellant was a common carrier of the cars that were burned up at the sugar refinery, and that its liability, as such, is determined by the case of P. & P. U. Co. v. C., R. I. & P. Co., 109 Ill. 135. It is further assumed that Reed had a right of action against it as a carrier, and that this right extended to the appellees as the owners of the cars. There are but few cases in any way analogous to this one. It is not determined by the case above cited, and upon which the appellees will attempt to fix the liability in this one. It will be seen in that case that no relation of lessor and lessee existed.

That case was one of first impression in our court. Since its decision the U. S. Circuit Court for the Eastern District of Missouri, Judge Treat presiding, has announced a contrary principle in a similar case. M. P. R. R. Co. v. C. & A. R. R. Co., 23 Am. & Eng. R. R. Cases, 718.

It is identical with the case of the P. & P. U. Co. v. C., R. I. & P. Co., and announces, as we believe, a correct principle, although opposite to that of our Supreme Court; but inasmuch as the C., R. I. & P. Co. had no interest whatever, as lessee or otherwise, in the tracks and property of the P. & P. U. Co., we do not think that the principle laid down by our court, if a correct one, is at all applicable to the present case.

In St. P. & S. C. R. R. Co. v. M. & St. L. R. R. Co., 26 Minn. 243, there was an agreement between the plaintiff and defendant companies, between whose lines of road there was a rail connection at Merriam Junction, and the defendant received from plaintiff at the junction eight of its cars, loaded with wheat, for transportation and delivery to consignees at Minneapolis, a point on defendant's road. By the terms of said agreement the defendant was required to haul the cars over its road, having exclusive charge and control

thereof, make delivery of the wheat, and return the cars, either loaded or empty, to the plaintiff, at the junction, in as good condition as when received, ordinary wear and tear by use excepted. Both parties were to share the profits of the transportation of the wheat and other freight so carried, and plaintiff was to receive from defendant, in addition to its shares of such profits, a stipulated compensation for the use of its cars, and while being so used by the defendant, the cars were wholly destroyed by fire at Minneapolis, without any fault or negligence on its part, amounting to more than ordinary wear and tear.

The court held that the defendant was not liable to the plaintiff for such loss, either as a common carrier, bailee for hire or otherwise.

Mr. H. W. WELLS, for appellees.

Our statute, act 1873, Starr & C. Ill. Stat., p. 1961, was construed by the Supreme Court to recognize a railroad company a common carrier of railroad cars. *P. & P. U. Ry. Co. v. C., R. I. & P. Ry. Co.*, 109 Ill. 136.

We insist that the case now presented is in all its essential features like the case of *P. & P. U. v. C., R. I. & P. Ry. Co.*, 109 Ill. 135.

It was the same fire, October 27th, referred to in that case, that destroyed the cars sued for in this case. The only difference in facts being, that in that case the defendant was liable to return the empty cars to the plaintiff, and in this case it was bound to store them until called for.

The so-called lease was simply a contract by which defendant became a common carrier for the other parties to the lease, and undertook the carriage of all their cars, loaded or empty, upon a compensation mentioned, and to be ascertained under the contract.

There is no attempt to waive or evade liability as a common carrier anywhere in the contract. Nor is there any disguise of its position, as such carrier.

The defendant accepted these cars as a common carrier, and began to transport them, and we insist for appellees that such

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responsibility continued; that it was legally liable as a common carrier until the transportation was completed. Nor can defendant excuse itself from the performance of its duty as carrier by producing this lease in evidence, to the receiver of a railroad which simply delivered these cars to defendant to be transported.

As was stated in the opinion, the case of the P. & P. U. Ry. v. C. R. I. & P. Ry., *supra*, was in that court a case of first impression. The principles governing the case, however, were well established and have never been questioned. *Malloy v. The Tioga R. R. Co.*, 39 Barb. 191; *Hannibal R. R. Co. v. Swift*, 12 Wall. 272; *Spears v. L. S. & M. S. R. R.*, 67 Barb. 518; *N. J. R. R. Co. v. Pa. R. R. Co.*, 3 Dutch. 100; *V. & M. R. R. Co. v. Fitchburg R. R.*, 14 Allen, 462.

The liability of a common carrier continues from the time the carrier accepts the goods until the contract of transportation is completed and the goods delivered in a warehouse.

In this case the carrier was to deliver the cars on its track to the sugar refinery, there to be unloaded, then was to store them in its yards. The liability as carrier continued until the cars were actually stored. *Mohr v. C. & N. W. R. R.*, 40 Iowa, 579; *Leavenworth, etc., v. Morris*, 16 Kan. 333; *C. & N. W. Ry. v. Bensley*, 69 Ill. 630.

The stoppage of the cars to be unloaded was not a storage of the cars, but merely one of the stages of transportation.

It is one of the inflexible rules of law that a carrier can not become a warehouseman while the goods are in transit. *McDonald v. Western R. R.*, 34 N. Y. 497; *Oumut v. Henshaw*, 35 Vt. 605.

These cars were in defendant's custody while at the sugar refinery, simply awaiting transportation. *R. R. Co. v. Mfg. Co.*, 16 Wall. 318.

This action is brought in the name of the owner of the cars. That the owners were the proper parties has been held by our Supreme Court in *Merchants Despatch v. Smith*, 76 Ill. 542; *G. W. R. R. v. McComas*, 33 Ill. 185.

The case of *I. C. Ry. v. Schwartz*, 13 Ill. App. 490, is a leading case upon this question, and while the question there

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turned upon the right of the consignee to sue under the contract, the reasoning of the court states the right in such cases as largely hinging upon ownership of the goods transported. See also *Stone v. Wabash, etc.*, 9 Ill. App. 48.

Per Curiam. We are of the opinion that the plea of the statute of limitations should prevail as to car No. 3043. It will be seen that each one of the cars mentioned in the above agreement was delivered to the appellant to be switched at different dates, hence the appellee, if it has a cause of action, would have a separate one for each car.

In the first declaration filed in October, 1884; the then plaintiffs declared for the loss of but three cars. All the cars were destroyed by fire September 27, 1881. The amended declaration was filed in February, 1887, in which the charge for the loss of car No. 3043 was first counted on as claimed.

This it will be seen was more than five years after the cause of action accrued, and was barred by the statute of limitations. The fact that the declaration was afterward amended so as to make appellees parties plaintiff, could not have the effect to revive the claim as to such car already barred. To gain the claim for this car in the original declaration by way of amendment would be no different in point of law than to file a new count for it. It was entirely omitted from the declaration till after the bar had taken place. It can in no way be regarded as a recounting for the same cause of action. This point seems to be fully settled in *I. C. R. R. Co. v. Cobb, Christy & Co.*, 64 Ill. 128.

In that case a new count was filed declaring on a cause of action for loss of oats, not embraced in the original declaration and after the lapse of the statute, and it was held to be within the statute. The plea was good as against so much of the count as was barred, and the fact that it set up a bar to all would not interfere to make it bad as to the portion barred.

We are of the opinion that the appellee was a proper party to bring the suit. *Merchants Despatch v. Smith*, 76 Ill. 542; *G. W. R. R. Co. v. McComas*, 33 Ill. 185. That as to a shipper of cars over appellant's road we must hold it to stand

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in the relation of a common carrier, as was fully decided in *P. & P. U. Ry. Co. v. C., R. I. & P. Ry. Co.*, 109 Ill. 136.

The appellee was the owner of the cars destroyed by fire, and was in no way bound by the contract between the railways, who were lessees of appellant, and the appellant, even if their contract relieved the appellant as to them, from the obligations of a common carrier, a point we do not now decide. The appellant was in the general business of switching cars for all railroads which would furnish it business. Whatever may have been decided in the United States District Court in Missouri, or in any other courts different, if different from the rule announced in the above cited cause reported in 109 Ill. 136 above, could have no binding effect in this court, as we are bound by the decisions of the Supreme Court of this State; so we will not stop to consider the cases cited by counsel for the appellant on that subject.

For the reason above given the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

C. AULTMAN & Co.

V.

OTTO WEBER.

Sales—Warranty—Breach—Action on Note—Evidence—Damages—Instructions.

1. In an action brought by the payee on a note given in payment for a machine, where a warranty that the machine would do as good work as any in the market, and its breach, have been established, the defendant may introduce evidence to show the difference between the value of the machine at the time of such breach, and what it would have been worth had the warranty been true, and have such sum deducted from the amount of the note.

2. Where there is an express warranty, the question of an implied warranty does not arise.

3. Where the defendant relies on an express warranty and states language used by the plaintiff sufficient to create such warranty, his evidence is not met by a simple denial of the warranty.

4. It is sufficient if a series of instructions properly presents the law of the case, though one of the series, if disconnected, might be in itself objectionable.

5. In the case presented the evidence supports the verdict for the defendant, and there was no error in the admission of evidence.

[Opinion filed December 8, 1888.]

IN ERROR to the Circuit Court of Putnam County; the Hon. S. S. PAGE, Judge, presiding.

Messrs. WILLIAM H. CASSON and EDWARDS & EVANS, for plaintiff in error.

Messrs. FRANK WHITING and BARNES & BARNES, for appellee.

URTON, J. This suit was brought on a note given by defendant Weber to the plaintiff, for a low-down Buckeye binder.

It was commenced before a justice of the peace, and judgment was rendered for the plaintiff; defendant took an appeal to the Circuit Court of Putnam County, where a trial was had and judgment was obtained in favor of defendant, to reverse which the case is brought to this court.

The machine was sold to the defendant by an agent of the plaintiff, David Moore, in the summer of 1883, for the sum of \$230, for which defendant gave his note to the plaintiff, due some time thereafter. The defendant had paid and caused to be indorsed upon said note \$18.40, September, 1884, and \$125 on the 5th day of May, 1885, and before this suit was commenced.

It is claimed by the defendant that the agent, Moore, at the time of the sale of the machine to the defendant, warranted it "to do good work," "as good as any other machine in the market;" that it was not as warranted, and that the damages thereby occasioned to defendant should be deducted from the amount due on said note.

The plaintiff denies the warranty and the resulting damages, as claimed.

The errors complained of are:

1st. That in the trial in the Circuit Court improper evidence was admitted on the part of the defendant.

2d. That the court erred in giving defendant's fourth instruction to the jury.

3d. That the verdict is against the weight of the evidence.

First. If a warranty and its breach were established by the evidence, and the jury so found by their verdict, the defendant had the right, on the question of damages, to show by the evidence, and the jury therefrom find, the difference in the value of the machine at the time the warranty was broken, and what the machine would have been worth had the warranty been true, and have that sum deducted from the amount due upon the note.

Defendant had the right to keep the machine and rely upon the warranty, and in so doing he could not, on showing a breach of the warranty, be compelled to pay for the machine more than it was worth in its then imperfect state or condition, if the warranty and the breach were proven. Tending to establish such facts on the trial, defendant was asked, as a witness: "Was that machine worth more or less, as it was, than it would have been if it had been as represented?" The witness answered, "Less."

Chris. Hartman, a witness called by the defendant, was asked, "What was that machine worth?" He answered: "The way it worked then, in 1884, it was not worth anything."

This witness further testified: "Other machines were working there in the same rye. The Plano was there. It was one of the machines then in the market. The Plano, after it started fairly, cut it down without trouble; the other (machine in question) had more trouble in getting it down." To which questions objections were made, overruled and exception taken, and plaintiff moved the court to strike out the answers of the said witnesses to the questions stated, which was refused and exceptions were taken. This, in substance, constitutes the alleged improper evidence of which complaint is made in the first assignment of errors. We do not perceive any substantial error in the ruling of the court below upon that point.

It is claimed, however, that the trial court erred in allowing a comparison by the machine in question with the Plano machine, for the reason that the warranty only applied to the machine then (in 1883) in use, and that the Plano machine was not then in the market in use.

It is a sufficient answer to this to say that there is no evidence in this record to show that the Plano machine was not in the market or in use in 1883, and there is some evidence tending to show that it was then in the market.

We are unable to see how the plaintiff could be prejudiced by the admission of the testimony complained of; certainly it was pertinent to the issue, nor do we think the evidence was a substantial invasion of the province of the jury on the questions involved.

Second. Did the court err in giving the fourth instruction to the jury for the defendant, viz.:

“A person who buys, without any special warranty, a machine from the manufacturer, who makes and sells it for a particular use, may keep the machine, even if it is not reasonably suited to the uses for which it was manufactured and sold, and for which he purchased it. There is an implied warranty in such case that the machine is reasonably suited for the purpose sold. In such case he can keep the machine, and when sued for the price of it, set up and have his damages allowed; and in such case his damages would be the difference in the value of the machine when the implied warranty is broken, from what the value would have been had the machine been reasonably suited to perform the work for which it was constructed and sold; but if there was an express warranty, relied upon by defendant, then he can not recover upon the implied warranty, but must recover, if at all, upon the express warranty.”

The subject of implied warranties on sale of chattels has perplexed the common law courts for many years and has been the source of many apparently conflicting decisions. We are not called upon to examine the cases determined upon that question in the case at bar, for the reason that we think the jury must have found from the evidence, as they were

certainly warranted in finding, that there was an express warranty of the machine in question; and the rule of damages is not variant in cases of express from that of implied warranties.

The defendant's evidence was that the agent of plaintiff and himself were in the field where the machine was being used. The agent said to him: "This will be a good machine for you to buy; we have no particular price fixed upon the machine yet, because we have not sold any. It is just a trial machine, and we will sell you this machine at the next year's terms." "This machine is not a perfect machine, but we will give you a perfect machine. We will make it a perfect machine. The machine will do as good work as any other machine in the market." The defendant replied that he would buy the machine on those conditions, and did so purchase it.

The agent, Moore, was called as a witness by the plaintiff to rebut this. He denies any warranty—using the word warranty—but he does not deny using the language quoted above. There is no substantial conflict in the evidence as to the language used at the time of sale. The defendant, in his evidence, gives it. The agent does not, but professes to state the legal effect of what was said. That the language used under the circumstances in evidence, relied and acted upon by the defendant, as he testifies and as appears by the subsequent facts in the case, constitute an express warranty, will not be disputed.

That all the parties in interest understood that there was an express warranty of the machine in question that it should do good work, or be made to, their subsequent conduct affirms. That the machine did not do good work is clearly established.

We deem it useless to discuss this point further; conceding that the instruction complained of, disconnected from the series given, might be objectionable, that alone will not be cause for reversal. It is sufficient if a series of instructions properly presents the law of the case—as we think is done in this case—though one of the series, when disconnected, might be in itself objectionable.

Third. Is the verdict against the weight of the evidence? We do not so think.

We are satisfied that the jury were justified from the evidence in finding a special warranty on the sale of the machine; indeed, we do not well see how they could have found otherwise. There can be no question as to the breach of the warranty. No one pretends that the machine ever did good work. It was sold with warranty for \$230. The evidence, undisputed, was that, at most, \$125 was its full value. The defendant had paid and plaintiff had indorsed upon the note \$143.40. Upon the evidence in this record the plaintiff was more than paid, and the jury did right in returning their verdict for the defendant.

We find no substantial error in the record, and the judgment below must be affirmed.

Judgment affirmed.

THE AMERICAN EXPRESS COMPANY

V.

OTTO WETTSTEIN.

Carriers—Express Companies—"C. O. D."—Failure to Deliver or Notify Consignor—Loss by Fire—Liability of Company.

1. An express company receiving a package for transportation "C. O. D." is bound to transmit it to its destination, tender it within a reasonable time to the consignee and demand payment; and in case of non-acceptance and non-payment it is the duty of the company to notify the consignor.

2. The neglect by an express company to deliver a package and collect the amount required thereon, and to notify the consignor of such failure, for an entire week, will render the company liable as to the consignor in case of loss by fire.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Ogle County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Messrs. O'BRIEN & O'BRIEN, for appellant.

When a carrier receives goods with instructions to collect the price for which they are sold, before delivery, and carries them to their destination, upon their being tendered to the consignee, if the latter, no matter for what reason, defers the payment and acceptance, the carrier must retain them a reasonable time to enable the consignee to prepare to receive them, and if he does not he will be liable to an action by the consignee. But he will hold the goods in the character of warehouseman. *Hutchinson on Carriers*, § 392; *The Great Western Ry. Co. v. Crouch*, 3 Hurl. & N. 183; nor is the carrier bound to offer the goods more than once. *Starr v. Crowley*, McClel. & Y. 129.

Where the carrier tenders the goods to the consignee, and he refuses to receive them, or where they are refused at the consignee's residence, or where the carrier has done all that the law requires of him toward accomplishing a delivery and from any cause fails to effect it, and the goods are of necessity continued in his possession, he from that time becomes responsible only as a depositary or involuntary bailee, and bound only to the exercise of reasonable care. *Heugh v. London and Northwestern Railway Company*, 5 L. R. Exch. 51; *Hutchinson on Carriers*, § 351, 356.

A formal tender is not required. *Young v. Smith*, 3 Dana, 91.

The consignee may, by his acts and conduct, as well as by formal writing, waive a complete delivery. *Schouler on Bailments*, § 508; *Moses v. Boston and Maine R. R.*, 32 N. H. 523.

Any reasonable arrangement between the carrier and consignee as to the mode of delivery will be binding on the consignor, and the carrier exonerated. 2 *Redfield on Railways*, page 90, § 26.

In the *Adams Express Company v. McConnell*, 27 Kan. 238, it is said: "If the express company failed to notify the consignee of the arrival of the goods, inasmuch as he knew of their arrival, and refused to receive them, the failure did not work any damage." See also *Flumer v. Buffalo, etc., R. R. Co.*, 44 N. Y. 510, 511.

When there is a delay on the part of the consignee in accepting and paying for the goods, or an absolute refusal to accept them, it is not, as the jury were told in the first instruction given for the appellee, the duty of the carrier, as a matter of law, to notify the consignor, in order that the carrier may be relieved of the duty of a common carrier. *Kremer v. Southern Ex. Co.*, 6 Caldwell (Tenn.), 356; *Hudson v. Baxendale*, 2 Hurl. & N. 575; 2 Redfield on Railways, 25, 46, 87, 90, 92; *Smith's Lead. Cas.* 258 (8th Amer. Ed., 1885); *Steamboat Keystone v. Mories*, 28 Mo. 243; *Fisk v. Newton*, 1 Den. 45; *Mayell v. Potter*, 2 Johns. Cas. 371; *Weed v. Barney*, 45 N. Y. 347; *Marshall v. Amer. Exp. Co.*, 7 Wis. 1; *Fenner v. Buffalo, etc., R. R. Co.*, 44 N. Y. 510; *Neal v. R. R. Co.*, 8 Jones (N. C.), 484; *Ostrander v. Brown*, 15 Johns. 39; *Angell on Carriers*, 291, 295; *Witbeck v. Holland*, 45 N. Y. 13; *Flanders on Shipping*, 276; *Heugh v. London, etc., R. R. Co.*, 5 L. R. 51; *Adams Ex. Co. v. McConnell*, 27 Kan. 238; *Wilson v. Royal Exchange Shipping Co.*, 24 Fed. Rep. 815; *Redfield on Carriers and Other Bailles*, 118, 302; *Schouler on Bailments*, §§ 500, 507, note 2; *Adams Ex. Co. v. Darnell*, 31 Ind. 22, 23; *Roth v. Buffalo, etc., R. R. Co.*, 34 N. Y. 548; *Young v. Smith*, 3 Dana, 91; *Richardson v. Goddard*, 23 How. 40; *Amer. Ex. Co. v. Hackett*, 30 Ind. 252, 253.

Messrs. HATHAWAY & BAXTER, for appellee.

UPTON, J. This action was commenced before a justice of the peace, by appellee against appellant as a common carrier, to recover the value of a package of goods delivered by appellee to the appellant at Rochelle, Illinois, on the 1st of July, 1887, to be forwarded by the appellant to one Mrs. Sires, at Hurley, Wisconsin, with instructions to the carrier to deliver the same upon the payment of the sum of \$80.

The package was a box about two feet square, and contained three dinner castors, four or five pickle castors, four or five dozen knives and forks, and was addressed "Mrs. M. A. Sires, Hurley, Wisconsin, C. O. D. \$80," on outside top of the box. At the time of the delivery of this package to appellant, and with the same, was delivered a bill, specifying each

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article contained in the package, in an open envelope left with the agent of appellant at Rochelle to be forwarded with the box.

This package, so received, was carried by appellant as consigned, and arrived at its destination (Hurley) about July 2, 1887, no notice being given of its arrival to the consignee, Mrs. Sires, until July 4, 1887, on which last named day she requested appellant's agent to hold the goods for a short time until her hotel, then in process of erection, should be completed.

The appellant made no demand on the consignee for the payment of the said sum of \$80 and appellant held the said package at the request of Mrs. Sires, consignee, without notice to appellee, the consignor, until the 9th day of July of the same year, when the same was destroyed by fire, while in appellant's possession.

It was stipulated among other things on the trial in the court below, "that the appellant was not in any manner liable for the origin of the fire," and "that the usual time for transmitting a letter by mail from Hurley, Wisconsin, to Rochelle, Illinois, was not longer than two days," and "that the appellant did not notify the appellee that the consignee had neglected to take and pay for said property in said package, on notice of its arrival," and "that the value of the property in question was the sum of \$80."

The appellee claims that appellant was guilty of such negligence in failing to demand payment of Mrs. Sires of the said sum of \$80, and in neglecting to tender the goods to the consignee, Mrs. Sires, and in neglecting to notify appellee that the goods were being held by the appellant at the request of said consignee, and failing to notify appellee that appellant had not delivered the same, that it became liable to appellee for the value thereof, \$80.

In the justice court a judgment was obtained from which an appeal was taken to the Circuit Court of Ogle County, where the cause was heard by a jury and a verdict given for appellee, a judgment being rendered thereon. The case is brought to this court on appeal to reverse that judgment.

The contention is, whether, under the evidence in this case, the appellant carrier receiving the goods C. O. D. (which means, as shown by the evidence, "collect on delivery"), was bound upon the arrival thereof at the place of destination in apt time, to tender the same to the consignee, demand the amount of the bill accompanying the shipment, and in case of non-acceptance or non-payment, to notify in apt time the shipper or consignor?

Great industry is manifested on the part of counsel on both sides in the citations made of adjudications of kindred questions in England and the courts of last resort in the several States of this Union, as well as from the text-books of authors of acknowledged ability and accurateness, but, in the view we take of this case, it will not be necessary for us to examine to any considerable extent the authorities cited.

Whatever may be the rule of law elsewhere, we regard it as settled in this State, so far as the questions involved in the case at bar are concerned, in the case of *Am. Merchants Union Ex. Co. v. Wolf*, 79 Illinois, 430. In that case it was held that an express company is not only required as a common carrier to transport the goods received by it for shipment to the place of destination thereof, but the further duty is enjoined upon it to deliver the goods to the consignee at his place of residence or business, and when directions are given to that effect by the consignor, it becomes the further duty of the express company to collect the price for which the goods were sold by the consignor to the consignee, and return the money to the consignor, and where goods transported by an express company are tendered by it to the consignee, and he fails to receive and pay for the same, it is the duty of such express company to notify the consignor of the goods, and when this is done, it is relieved from its responsibility as a common carrier, and holds the goods subject to the order of the consignor, but not before.

In that case it is further held that an express company can discharge itself from responsibility as a common carrier in no other way than by an actual delivery of the goods to the proper person at his residence or place of business, except by

showing that it has been excused from so doing, or prevented by the act of God or the public enemy. If we do not wholly misapprehend that case it must be held decisive of the case at bar.

The instructions of the court were in accord with the rule established in the case above referred to, and we think that the evidence in this case shows such misconduct and neglect of duty on the part of the express company as to render it liable in this action, and that the jury properly so found.

We hold the law to be that the liability of an express company as a common carrier, at least in this State, is not to be measured by that of common carriers in general. The doctrine applied to railways and transportation companies in general, is well settled, that when goods arrive at their destination, if the consignee is not ready to receive them, it is the right of such company to store the goods in a safe warehouse, and there hold for consignee until called for, and that ordinarily no notice is required to be given of the arrival of the goods to consignee or consignor.

But this doctrine, and more of a kindred character, has no application to the duties and obligations of an express company. *Baldwin v. The American Ex. Co.*, 23 Ill. 197.

We further hold that in the case at bar it was the duty of appellant, upon receipt of the package containing the goods in question, consigned as before stated and marked "C. O. D. \$80," to have delivered such package or have offered to deliver the same to the consignee in person or at her place of business, within a reasonable time after receipt thereof at the place of destination, and to have then collected the amount as indicated, the \$80, and transmitted the same to the consignor at Rochelle, Ill., or have offered to deliver the same to consignee in person or at her place of business, and if not accepted and paid for in apt time, to have notified consignor of that fact, and held the goods subject to his order, and that the holding the goods from the 2d or 3d day of July, 1887, to the 9th day of the same month, without actual delivery or offer of delivery, and without collecting the amount ordered to be collected, and in not notifying consignor of the non-delivery of said goods, or

the non-payment of the charges thereon, or of the refusal of the consignee to accept and pay for said goods, until after the 9th of July, when the same were destroyed by fire, was such unreasonable delay and negligence on the part of appellant, as to render it liable in this action for the value of said goods; and finding no error in the judgment of the court below, the same is affirmed.

Judgment affirmed.

CHICAGO & ALTON RAILROAD COMPANY

V.

ALBERT ADLER.

Railroad—Personal Injury at Street Crossing—Action for Damages—Dangerous Rate of Speed—Contributory Negligence—Instructions—Damages—Whether Excessive.

1. In an action against a railroad company to recover damages for causing the death of plaintiff's intestate, it is *held*: That the court properly declined to instruct the jury to find for the defendant; and that the questions whether the deceased was in the exercise of reasonable care and whether the defendant was guilty of negligence, were for the jury.

2. The question of damages rests in the sound discretion of the jury. In the case presented a verdict for \$2,400 for causing the death of a healthy, industrious man, twenty-one years of age, is sustained.

3. It is proper to refuse instructions which undertake to state what acts done or omitted on the part of the deceased would constitute such negligence as to defeat a recovery.

4. Persons using the streets in a city have the right to assume that railway trains passing over the crossings will be run with great caution and with due regard for their rights.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Will County; the Hon. GEORGE W. STIPP, Judge, presiding.

Messrs. BROWN & KIRBY, for appellant.

It is respectfully submitted that in this case there was no evidence whatever of the exercise of ordinary care to avoid injury upon the part of the deceased. There is no fact or circumstance from which the jury could infer the existence and use of ordinary care. On the contrary, the evidence shows that he was grossly negligent. It is essential in these cases for the plaintiff to prove that he was in the exercise of ordinary care to avoid injury, and the absence of such proof, or facts from which it could be inferred by the jury, is fatal to the cause of the plaintiff, upon whom the burden of proof rests as to that fact. *C. & I. Co. v. Martin*, 115 Ill. 370-3.

In cases where danger is reasonably to be apprehended, proof of positive or special care must be made. *C., B. & Q. R. R. Co. v. Olson*, 12 Ill. App. 245.

“On approaching a railroad a traveler must use his eyes and ears, and must avoid danger if he can, notwithstanding the negligence of the company.” *Henze v. St. L., K. C. & N. R. R. Co.*, 71 Mo. 636; *Purl v. St. L., K. C. & N. R. R. Co.*, 72 Mo. 168; *Pa. Co. v. Ruddell*, 100 Ill. 603; *C. & N. W. R. R. Co. v. Hatch*, 79 Ill. 137.

Neglect to sound a whistle or ring a bell is not such neglect as will authorize a recovery of itself, but it must be shown by the evidence that the injury was the result of such negligence. *I. & St. L. R. R. Co. v. Blackman*, 63 Ill. 117; *C., B. & Q. R. R. Co. v. Van Patten*, 64 Ill. 510; *I. C. R. R. Co. v. Benton*, 69 Ill. 74; *C., B. & Q. R. R. Co. v. Notzki*, 66 Ill. 455.

The conclusion from all the cases is, that if one goes upon a track without taking the necessary precautions to ascertain whether there is an approaching train or not, he is guilty of gross negligence and he can not recover. *N. P. R. Co. v. Heileman*, 49 Pa. St. 60-64; *P. R. Co. v. Beale*, 73 Pa. St. 504; *Rorer on Railroads*, Vol. 1, Ch. 17, Sec. 7, p. 535.

The burden of proof in this case rested upon the plaintiff to prove, not only that defendant omitted to sound a whistle or ring a bell, but also to show that he was in the exercise of care and diligence at the time of the accident. *C., B. & Q. R. R. Co. v. Damerell*, 81 Ill. 454, and cases there cited.

We maintain that all the surroundings put upon Beuck the

duty of exercising a positive or special care to avoid the danger which he knew would attend the crossing of these railroad tracks, and a mere negative condition of going on the tracks without looking or listening would not put him in the position of exercising ordinary care. Such is the law as laid down by this honorable court in a well considered case. *C., B. & Q. R. R. Co. v. Olson*, 12 Ill. App. 245; *C., B. & Q. R. R. Co. v. Dougherty*, 12 Ill. App. 181; *U. Ry. & T. Co. v. Kallaher*, 12 Ill. App. 400.

Messrs. HALEY & O'DONNELL, for appellee.

Whether or not a party is guilty of negligence in not looking out for an approaching train is a question of fact for the jury, and where there is evidence tending to establish the facts relied on for a recovery, the verdict must stand. The question of negligence is a question of fact for the jury. *L., S. & M. S. Ry. v. O'Conner*, 115 Ill. 254; *C. & A. Ry. Co. v. Carey*, 115 Ill. 115.

Where there is evidence tending to show that a crossing is of a dangerous character in a populous place, and that the injury was caused by the rapid running of a train there, a verdict for plaintiff will not be disturbed. *C., B. & Q. R. R. v. Payne*, 59 Ill. 534.

The persons in charge of a train are presumed to be cognizant of the character of a crossing and that persons are liable at all times to be in the act of passing. *I. & St. L. R. R. v. Stables*, 62 Ill. 313.

Where a railroad company is not restricted by law to any rate of speed, unusual speed at crossings, where men or animals are generally exposed to danger, may be considered with other matters—as a failure to give signals, etc.—to determine the want of proper care. *Thompson on Neg.*, Vol. 2, p. 418, n. 9.

A railroad company should not permit obstructions upon its right of way, near a crossing, which will prevent the public from observing the approach of trains. *R. R. I. & St. L. R. R. Co. v. Hilmer*, 72 Ill. 235.

There is no precise rule as to the duties which railway companies owe to strangers crossing their lines of travel, except

C. & A. R. R. Co. v. Adler.

where the same is prescribed by statute. What will constitute reasonable care depends on the circumstances. A greater degree of care is required at street crossings in populous cities than at the crossing of a country road. Thompson on Neg., Vol. 2, p. 417.

C. B. SMITH, J. This is an action in case, brought by Albert Adler, administrator of William Beuck, deceased, against The Chicago and Alton Railroad Company, charging that it negligently caused the death of Beuck. The undisputed facts as disclosed in this record are these: In the city of Joliet, where the accident occurred, there are two streets crossing each other. Fourth avenue runs east and west. Eastern avenue runs northeast and southwest and crosses Fourth avenue at an angle. At the crossing of these two avenues the Chicago and Alton railroad track also crosses, running nearly in a north and south direction. At this crossing there are three railroad tracks. On the north and south sides of Fourth avenue and on the east side of Eastern avenue are two warehouses, one on each side of Fourth avenue, and coming close up to the line of Eastern avenue. There is also a scale-house on the north side of Fourth avenue between the railroad tracks and the warehouse, and a little northeast of the warehouse there was a residence. Both these streets were much used by the public, being within the corporate limits of the city of Joliet. The railroad also seems to have used this point for two or more side-tracks or switches. On the day of the accident Barnum's show was exhibiting in Joliet only a short distance from the junction of these streets, and a large number of people were using the streets. What was known as the Denver train on defendant's road going south was due about two o'clock in the afternoon. The deceased, Benck, about that time was driving a single horse and buggy westward on Fourth avenue on a gentle trot, and just as he came on the crossing of the railroad track he was struck by the locomotive drawing the Denver passenger train and instantly killed. The declaration charges the defendant with having negligently caused his death while the deceased

was in the exercise of reasonable care. The general issue was pleaded. A trial resulted in a verdict for plaintiff of \$2,400. A motion for a new trial by the defendant was overruled and judgment rendered on the verdict. Appellant brings the case here on appeal for review and assigns the usual errors. The important and material question involved is, whether the defendant was guilty of such a degree of negligence in running its train as to make it liable for the death of Beuck. The appellant insists, *first*, that defendant was not guilty of negligence in running its train on that day, and *secondly*, that if its negligence be proven or admitted, then it is excused by the negligence of the deceased, which it alleges was equal to or greater than that of defendant. We have given above the situation of the streets and the railroad track at the point where the accident occurred as conceded by both parties. There were some controverted questions involved on the trial of the case, which went to affect the question of negligence of both parties. Several witnesses swear for the plaintiff on the trial that the railroad company had left standing on one of its side tracks, east of the passenger track, a number of the box cars belonging to Barnum's "show train," and that they came so close up to the north line of Fourth avenue, and lay there northward for some distance along the line of the passenger track, that the line of vision was so obstructed that the deceased, going westward on Fourth avenue, could not see the approaching train coming from the north until he was almost on the track. These cars lay westward from the warehouse and scale-house and were additional obstructions to any one seeing to the north, who was approaching the track from the east. Some of plaintiff's witnesses also swear positively that no flagman was at the crossing to give warning of the approach of the train. On the part of the defendant a number of witnesses swore that there were no cars standing on the track to obstruct the view, and that there was a flagman standing in the middle of the crossing waving his flag at the deceased and trying to stop him, but that he neither looked for the cars nor saw the flagman, but drove straight on the track after some person had called to him to stop. The proof is also that

the train was running at the time at a rate of speed from fifteen to twenty miles an hour. Neither the engineer nor the fireman denies this rate of speed. Several of plaintiff's witnesses swear they heard no bell ringing and heard no whistle. This is contradicted by the fireman on the train as well as by other witnesses, who say they heard the bell. After a careful examination of the evidence we can not say that the jury were not justified in finding the defendant guilty of negligence in running its train at that rate of speed in a populous city and especially at a public street crossing, and within a short distance of the "Greatest show on earth." The fast and dangerous speed of the train is one of the acts of negligence charged in the declaration. Whether that rate of speed was proven and was dangerous and reckless running in a city and at a public crossing, either with or without a flagman there, was a question of fact for the jury, and unless we can clearly see from the evidence that they have found erroneously, or been governed by prejudice or passion, we are not warranted in setting aside their finding under the uniform ruling of this and the Supreme Court. So, also, was the alleged negligence of the deceased at the time of his death a question of fact for the jury, and we see no sufficient reason to interfere with their finding upon the evidence in the record. He was driving in a top buggy, going west, with the warehouse and weighing house on the north of him, and if plaintiff's witnesses are correct, also a line of Barnum's cars lay in a position to prevent him seeing the train approach from the north. One witness who was driving in the same direction and who had almost reached the track, swears that he neither heard nor saw the train until it came plunging on the crossing from behind the line of Barnum's cars, and was immediately upon the deceased. The degree of care to be exercised by persons using streets and public highways as well as railways using the crossings depends very much on the situation and surroundings of both. While it is always and under all circumstances the duty of both to use reasonable care, still, reasonable care in one situation might not be reasonable care in another. Thus a rate of speed for a train in crossing a public highway in the country,

which would there be reasonable, might be dangerous and reckless in a city or town. Persons using streets in a city have a right to suppose that railway trains passing over the crossings will be run with great caution and with due regard to the rights of people going on the streets. *The I. & St. L. Ry. Co. v. Stables*, 62 Ill. 313; *R. R. I. & St. L. Ry. Co. v. Hillman*, 72 Ill. 235. It is also the duty of railroad companies to keep the crossings and the approaches to them reasonably clear from incumbrances that hinder the public from seeing the approach of trains.

Complaint is made that the court erred in not directing the jury to find for the defendant. There was no error in this. Under the state of the evidence in this case, such an instruction to the jury would have been manifestly wrong. The court should never take the case from the jury unless it is clearly satisfied that a verdict could not stand, and where there is substantially nothing for the jury to try. This question came before the Supreme Court in *C., B. & Q. R. R. Co. v. Payne*, 59 Ill. 534, upon a state of facts very similar to those disclosed in this record. In that case Payne was killed at a public highway crossing in the country, much used by public travel, and from its situation made a dangerous crossing. The court was then asked to instruct the jury to find for the defendant, but the court refused so to do. In that case the road crossing was two miles from a populous city, and the ruling of the court was held correct.

The second and third instructions asked by the defendant are substantially alike, and were both properly refused by the court. They both distinctly declare what acts done or omitted on the part of the deceased would constitute such negligence as to defeat a recovery. What acts done or omitted will constitute negligence is a question of fact for the jury to decide, and not for the court, upon the trial. These two instructions asked the court to usurp the province of the jury. *Wabash R. R. Co. v. Elliott*, 98 Ill. 481.

Complaint is made that the court modified another of defendant's instructions (not numbered) before giving it. The modification simply submitted to the jury to say whether the

supposed facts in the body of the instructions, if true, amounted to acts of negligence on the part of the deceased. In this there was no error.

Complaint is also made that the court erred in giving plaintiff's instructions. But five instructions were asked by the plaintiff. We find no error in any of them; they lay down the simplest and plainest maxims of the law governing the case and we think are free from the criticisms made upon them. We find no error committed against the defendant in the instructions. Indeed, the instructions given for the defendant are very elaborate, (twenty-one in number,) and lay down the law as clearly and forcibly in favor of the defendant as it was possible for the learned counsel to prepare and write.

It is lastly urged that the court ought to have granted a new trial because the damages are excessive. The deceased was a young man about twenty-two years of age and was a butcher. The evidence shows that he was an active and industrious young man; that he worked for Adler from the time he was twelve or fourteen years old, and that he gave all his earnings to his mother. Adler swears that his mother was at one time indebted to him in the sum of \$400 and that this young man and his brother paid it all off for their mother. There is no standard by which to measure the damages in cases of this kind except the sound judgment and discretion of the jury and the character and habits of the deceased as disclosed from the evidence. The damages can only be compensatory for pecuniary loss. In *the City of Chicago v. Major*, 18 Ill. 349, a verdict for \$800 was sustained for the death of a four year old child. In *C. & A. R. R. Co. v. May*, 108 Ill. 288, a judgment was recovered by the widow of the deceased, who was a laborer, for \$3,250, and was sustained on appeal. We do not think the verdict in this case was excessive under the evidence.

Perceiving no error in this record the judgment is affirmed.

Judgment affirmed.

CHICAGO & ALTON RAILROAD COMPANY

V.

JOHN HENNEBERRY.

Railroads—Embankment—Overflow of Plaintiff's Lands—Variance.

1. The owner of land, overflowed because of the existence of a railroad embankment, can not maintain an action against the railroad company for damages unless the embankment has been created or changed so as to increase the damage to his land since he became the owner thereof.

2. Where the declaration claims damages for obstructing a watercourse, and the evidence does not establish the existence of such watercourse, the variance is sufficient ground for reversal.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding.

Messrs. BROWN & KIRBY, for appellant.

Messrs. HALEY & DONNELL, for appellee.

C. B. SMITH, J. The declaration in this case contains four counts. The first charges appellant with maintaining an embankment across plaintiff's premises, and damming a watercourse which flowed across plaintiff's land, and thereby throwing the water back and destroying the crops and grass.

The second count alleges that on January 1, 1881, there was a watercourse across plaintiff's premises, through which ran surface water on said premises, and that defendant and others erected an embankment between plaintiff's premises and the adjoining land, in such negligent manner as to prevent the water collecting on plaintiff's land from flowing through said watercourse, and that defendant operated the railroad and maintained the embankment until the commencement of the suit, and thereby the waters were thrown back on plaintiff's premises, to his damage, etc.

28 110
42 126
28 110
153 357

The third and fourth counts are substantially the same as the first and second, both alleging that a watercourse existed on plaintiff's land, and that the defendant maintained the grade, and raised the grade across his land, whereby the water failed to flow off, and plaintiff was thereby damaged.

The defendant below pleaded the general issue, and a trial was had, resulting in a verdict and a judgment for the plaintiff for \$1,558.50. A motion for a new trial was overruled and judgment rendered on the verdict. Appellant brings the case here for review.

The plaintiff owned 102 acres of land, but prior to the time he bought his land the Illinois River Railroad Company had bought its right of way from the canal commissioners, and had made its embankment and constructed its road. The plaintiff purchased from the same party. Plaintiff himself testifies that he knew the railroad was built when he bought the land, and knew the embankment was there, and knew that it flooded the land he bought; that it kept the water back until it raised and ran over the embankment, and the effect was to flood that quarter of section, and it did flood it. There is no evidence in this record to show that the railroad company has done anything to increase the damage to the land since the plaintiff bought it. There is evidence to show that the embankment has been since raised about eight inches, but there is no proof to show that the increase in the height of the embankment has been the cause of any additional back flowing of the water, and certainly no evidence that any additional damage has been caused over what resulted from the first embankment, made before the plaintiff bought his land.

The plaintiff can not recover for any damage caused by obstructions made before he bought his land, and which have since then been maintained in the same manner, without showing that such changes have been made in the embankment as to throw additional burdens on his land.

This precise question was settled in the T., W. & W. Ry. Co. v. Morgan, 72 Ill. 155. The court, in that case, says: "The appellee did not own the lands when the company graded and

constructed its road at that point. Whatever damage was done by reason of grading the road-bed was to his grantor. In the absence of all evidence on that subject, it may be presumed that the company adjusted the damage with him. If the former owner did not complain, certainly his grantee can not. He purchased the land with the incumbrance of the railroad upon it. He could see exactly how the farm was affected by the construction of the railroad. It is not averred the company has since made any change. This case is clearly within the principle of cases of the I. C. R. R. Co. v. Allan, 39 Ill. 205, and T. W. & W. Ry. Co. v. Hunter, 50 Ill. 325." These cases are decisive against the judgment in this case upon the evidence and pleadings in this record.

There is another reason why this judgment must be reversed. Every count in the declaration alleges that a watercourse crossed plaintiff's land, and that the water flowed through the watercourse, and that the defendant obstructed this watercourse. We do not think the evidence shows the existence of a watercourse, and there was, therefore, a variance between the pleadings and the proof. For the foregoing reasons the judgment is reversed and remanded.

Reversed and remanded.

EDWARD C. HEGELER

V.

THE FIRST NATIONAL BANK OF PERU, ILLINOIS.

Bill to Set Aside Judgment by Confession—Fraudulent Concealment—Estoppel in Pais.

The mere failure of a creditor to make public his possession of judgment notes given to him by his debtor, is not fraudulent, where he does nothing to persuade or influence others to give the debtor credit.

[Opinion filed December 8, 1888.]

H. geler v. First Nat. Bank of Peru.

IN ERROR to the Circuit Court of La Salle County; the Hon. DORRANCE DIBELL, Judge, presiding.

Messrs. BULL, STRAWN & RUGER, for plaintiff in error.

A deed not at first fraudulent may become so by being concealed or not pursued, if creditors are thereby induced to give credit to the grantor. *Hildreth v. Sands*, 2 Johns. Ch. 35; *Perine v. Dunn*, 3 Johns. Ch. 508.

If an instrument is made with the intent to hinder and delay creditors, it is not purged because the creditor may also have had some other purpose in view. *Reid v. Noxon*, 48 Ill. 323; *Merry v. Bostwick*, 13 Ill. 398.

Kerr on Fraud and Mistake, p. 42, says: "Fraud, in contemplation of a court of equity, may be said to include, properly, all acts, omissions and *concealments* * * * by which an undue or unconscientious advantage is taken of another." Citing *Belcher v. Belcher*, 10 Yerg. 121; *Kennedy v. Kennedy*, 2 Ala. 571; *Gale v. Gale*, 19 Barb. 249.

And on page 43: "Fraud may be collected and inferred from the matters and circumstances of the transaction as being an imposition and cheat on other persons not parties to the transaction." Citing *Jones v. Bolles*, 9 Wall. 364; *Phelen v. Clark*, 19 Conn. 421.

In *Bank of U. S. v. Housman*, 6 Paige, 534, it is likewise held that a deed otherwise *bona fide* becomes void, if concealed, and others have been induced to trust the grantor, upon the belief that he was owner of the property conveyed.

In *Hildreth v. Sands*, 2 Johns. Ch. 48, the court holds that "a deed not fraudulent at first may afterward become so by being concealed, or not pursued, by means of which creditors have been drawn in to lend their money."

In *Scrivener v. Scrivener*, 7 B. Monroe, 374, the facts were that a deed was withheld from the records for some time after its execution, until the credit of the grantor (founded in part on the apparent ownership of the land) was exhausted, when the deed was put upon record. The court says: "The deed has thus been, evidently, a means of deceiving and defrauding others, and there is some reason to infer that it was originally

so intended. At any rate, it has, by being so long kept secret, and finally put upon record, after the grantor became embarrassed, * * * been made the instrument of fraud against the creditors of the grantor."

In *Gregg v. Martin*, 12 Allen, 498, the facts were that the principal defendant had assigned, openly and for a valuable consideration, the wages he expected to earn under an existing contract. They were attached under trustee process by subsequent creditors, and the court held that "an assignment of future wages to be earned under an existing contract, if made for the purpose of preventing them from being attached by trustee process, is void; and the fact that it was made openly and for a good consideration is immaterial." Citing *Boylan v. Leonard*, 2 Allen, 407; *Clapp v. Leatherbee*, 18 Pick. 131, 138; *Parkman v. Welch*, 19 Id. 231, 237; *Kimball v. Thompson*, 4 Cush. 441.

In the case at bar the judgment notes were kept concealed for the express purpose of sustaining the credit of the glass company, and thereby enabling it to obtain credit, borrow money, etc., and then to be used without a moment's warning, and to the injury and prejudice of such subsequent creditors.

Mr. G. S. ELDRIDGE, for defendant in error.

LACEY, P. J. This was a bill in equity filed by plaintiff in error against defendant in error, for the purpose of setting aside certain judgments by confession in favor of defendant in error against the De Steiger Glass Company. The statement of the facts and pleadings, as far as necessary, is about as follows:

On December 22, 1882, the First National Bank of Peru, a corporation doing business under the national banking act, obtained two judgments by confession in the Circuit Court of La Salle county against the De Steiger Glass Company, the first for \$35,050 and costs, of which sum \$50 was attorney's fees, and the second for \$5,325 and costs. Upon the same day executions were issued upon said judgment to the sheriff of La Salle county, and by him levied upon a large amount of

real estate as the property of the De Steiger Glass Company, and the same advertised for sale.

On December 26, 1882, the La Salle National Bank recovered a judgment by confession in the same court against the De Steiger Glass Company, for \$7,437.34 and costs, and an execution thereon was issued that day.

On January 1, 1882, a judgment by confession was obtained by Edward C. Hegeler against the De Steiger Glass Company in the same court for \$14,500 and costs, and an execution was issued thereon on the same day to the same sheriff, and levied on real and personal property; and the same was returned unsatisfied, but with the levy not released, after the commencement of this suit.

On January 11, 1883, the La Salle Coal Mining Company recovered a judgment by confession in the same court against the De Steiger Glass Company for \$2,945.17.

Numerous other judgments against the De Steiger Glass Company followed in circuit and justice courts, the details and amounts of which need not now be stated.

On June 13, 1883, the First National Bank of Peru recovered a third judgment in La Salle County Circuit Court against the De Steiger Glass Company for \$18,137.47 and costs, by summons and default.

Meantime on April 4, 1883, a few days before the date fixed for the sale of the real estate of the De Steiger Glass Company on the executions of the First National Bank of Peru, Mr. Hegeler filed his original bill in this case, attacking the validity of the judgment so obtained against the De Steiger Glass Company by the First National Bank of Peru, and asking that they and the executions and levies thereunder be set aside, and the property of the De Steiger Glass Company distributed among all the creditors of that company. The bill was filed in behalf of all such creditors.

Service was had on the First National Bank of Peru before the day fixed for the sheriff's sale; and at that sale a notice was read on behalf of Mr. Hegeler, stating the filing of the bill and the object sought by it. But no injunction having been obtained the First National Bank of Peru caused the

sheriff to proceed and sell the several tracts levied upon, and the bank became the purchaser at such price that its judgment for \$35,050 was returned satisfied in full, and its judgment for \$5,325 was returned satisfied to the extent of \$5,290.46, leaving a little over \$35 unsatisfied, besides interest. The bank has since taken out sheriff's deeds for part of the property.

The question to be decided is whether the two judgments of the defendant in error are fraudulent as to the claim of the plaintiff in error, Hegeler. The plaintiff in error is the only one who has sued out this writ of error. The date of the two notes upon which the judgments in favor of defendant in error was confessed bore date January 10, 1882, and were each due in January, 1882, and each accompanied by a power of attorney to confess judgment at any time; that the indebtedness for which the notes were given was existing long prior to the giving of these notes and the respective power of attorneys, and it is admitted that the notes were given for *bona fide* indebtedness.

It is charged in the bill at the time the notes were given that the said De Steiger Glass Works was insolvent, which was known to defendant in error; that it had cause for so believing; that just prior thereto the glass works offered to mortgage its property to the defendant in error to secure said indebtedness, but the bank refused because it would injure the credit of the said glass company and prevent it from obtaining further credit and loans, and therefore it took the notes with the power of attorney attached thereto and agreed to conceal the same, and to allow the said glass company to retain the full control of the property free from any record or known lien; that in pursuance of such agreement the defendant in error, with the intention of allowing the said glass company to obtain new and future credit elsewhere, and to defraud its creditors, did keep concealed in its possession for over eleven months, till December 22, 1882, said judgment notes, when it entered judgment thereon and took executions, and made levies as aforesaid, with express intent of defeating the just claims of appellant, etc., incurred during the period of said concealment.

It charges that in consequence of the false representations of said glass company and the fictitious credit it secured by defendant in error in allowing it to retain all its property apparently free from incumbrances, without which the plaintiff in error would not have loaned the said glass company the amount of money for which his notes were subsequently given, that the plaintiff in error loaned his money. And it is claimed that in equity the defendant in error's judgment ought to be postponed to that of plaintiff in error's. Now we think the evidence fails to show that defendant in error acted in bad faith or was wilfully trying to entrap any one into loaning the glass works money, or that it acted in such a way as to be chargeable with actual fraudulent intent.

It probably knew that the glass works were somewhat embarrassed, but thought with friendly treatment it would be able to pay its debts and come out of its embarrassments, and was willing to take the chances of losing its own debt in order to befriend its debtor.

There was no particular effort to conceal the existence of the notes and power of attorney more than defendant in error did not give it any publicity. In fact no one ever inquired of it about the existence of the notes or the standing of the glass company, and especially not the plaintiff in error. Counsel for plaintiff in error claim that there is a great distinction between the rights of prior and subsequent creditors of the debtor company, as far as the plaintiff in error's equities are concerned, he being a creditor accruing subsequently to the execution of the notes.

But we think that the distinction is more fanciful than real, and no just claim to any such vantage can be set up unless the rules of estoppel *in pais* can be applied.

Now we think that there can be no such grounds successfully urged in this or similar cases, unless there was some intent to defraud, and some action of which the plaintiff in error knew and acted on to his disadvantage, being induced thereto by defendant in error. If plaintiff in error, prior to his loaning his money to the glass company, inquired of defendant in error of the company's condition financially and

informed it he was about to make it a loan, and the defendant in error had made false statements in regard to and denied or concealed the existence of the notes, then the doctrine of estoppel might apply. But in a case like this, where nothing was done to mislead any one, except the fact of the existence of the defendant in error's own debt and notes, with power of attorney to confess judgment and the failure to make it public, we can see no grounds for applying the doctrine of estoppel.

If such should be the rule of law no creditor who conceived his debtor to be hard pressed and "shaky" would dare to give the debtor any leniency. He must make proclamation of his claims to the world and sue immediately or take the chances of being postponed to all subsequently accruing creditors. Because, as is claimed here, he would have good reason to know that his debtor might obtain a fictitious credit as a man of means, and be liable to contract debts on the strength of it, when in fact if his debts were paid or the public knew of his real condition, he would not be likely to be deceived.

As we think, the case of *Field v. Ridgely*, 116 Ill. 424, fully settles the law against the contention of the plaintiff in error. In that case the court uses this language, which is peculiarly applicable to the facts of this case: "We are aware of no principle outside of self-interest and prudence in business that requires the holder of a mortgage to put it on record at any particular time. By not doing so promptly he runs the risk of having it postponed to junior liens and even of losing the benefit of it altogether. As to subsequent purchasers and creditors without notice such securities take effect from the time of filing only. As to the complaint that appellees held the notes so long without giving notice of their having them, we perceive no force in it. There is no law or mercantile usage, so far as we are advised, that requires one in business to disclose the state of his accounts with his customers, and there are manifest reasons why this should not be done, except when the creditor is especially interrogated on the subject by one having a personal interest in knowing."

We think this decision covers every point urged against the

Langworthy v. Golden.

validity of plaintiff in error's judgments. The application is obvious. Many of the same authorities cited in this case were cited in that to support Field, and were by the Supreme Court fully considered and nothing in them was found to incline it to hold as Field's attorneys contended was the law; and the same principle being involved here we see no reason why the rule announced is not decisive.

This being the only error assigned the decree of the court below is affirmed.

Decree affirmed.

FRANK LANGWORTHY ET AL.

V.

IDA GOLDEN.

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Wills—Construction—Legacy—Bill to Enforce Payment—Lien upon Testator's Land—Statute of Limitations—Deed—Constructive Notice.

1. A legacy to a granddaughter, to be paid out of the testator's estate when she arrives at the age of eighteen, is a lien upon land belonging to the estate, where the personal property is insufficient.

2. The statute of limitations does not apply to a legacy.

3. In order that the record of a deed should be constructive notice of its existence, it should lie in the apparent chain of title to the land in question.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Bureau County; the Hon. GEORGE W. STIPP, Judge, presiding.

Messrs. ECKELS & KYLE, for appellants.

Legacies must be paid out of the personal property of the testator unless otherwise expressly provided in the will. *Heslop v. Gatten*, Ex., etc., 71 Ill. 528; *Heslet v. Heslet*, 8 Ill. App. 22.

Even where a legacy is made a lien upon real estate, the

personal property must be first resorted to. Willard's Eq. Jur. 489.

Before the appellee could have recourse upon the real estate of the testator, it was incumbent on her to show that William Hunter did not leave personal estate sufficient to pay said legacy. The legatee is bound by the recital in the will, and from the language used it is apparent that the testator had both money and chattel property.

The statute of limitations is as binding on courts of equity as on courts of law, and in equity, as at law, the statute begins to run when the cause of action accrues. Angell on Lim., Secs. 25-30; 2 Story Eq. Jur., Sec. 1520.

It is undoubtedly true that the courts have held that the statute of limitations does not run against certain kinds of express trusts. But that is only when the controversy is between the trustee and the *cestui que trust*. Angell on Lim., Secs. 166, 174.

But that is not this case. If there is any relation of trust existing between the appellee and any of the appellants it is in the nature of a resultant trust. It becomes so by reason of or as a result of the purchase of the land. But even in case of express trusts the statute begins to run from the time the trustee denies the trust and commences to deal with the property as his own, and the *cestui que trust* becomes aware of the fact that he is so dealing with the property.

Mr. JOHN SCOTT, for appellee.

It is a well settled principle of law that where a testator gives several legacies and provides for the payment of debts, as in this case, without creating any express trust for their payment, and then makes a general residuary disposition of the balance of his estate, blending the realty and personalty together into one fund, the real estate will be charged with the payment of the legacies, and there is no exception to this rule. Hill on Trustees (4th Am. Ed.) 360; 2 Perry on Trusts, Secs. 569, 570, 571; Lewis v. Darling, 16 How. 10; Harris v. Fly, 7 Paige, 421; 1 Redfield on Wills, 271, 279; Gallagher's Appeal, 48 Pa. St. 121; Sherman et al. v. Sherman, 4 Allen, 392.

A plea of the statute of limitations to an ordinary action for a legacy has never been known; it has long been a settled principle that the statute does not apply in such a case, and courts of chancery have refused to adopt the rule of limitation in suits for a legacy. Angell on Limitations, Secs. 90 and 168; Perkins v. Cartwell, 4 Har. (Del.) 270; 2 Perry on Trusts, Sec. 828; Whiting v. Whiting, 4 Gray, 207.

Appellee would not be guilty of *laches* unless her claim was barred by the statute of limitations. Gibbons et al. v. Hoag, 95 Ill. 65; Smith v. Ramsey et al., 1 Gil. 378.

A legacy will draw interest, generally from the time of payment limited in the will. Loring v. Woodward, 41 N. H. 391; Hill on Trustees, 364.

LACEY, P. J. This was a bill in equity filed by the appellee to enforce the payment of a specific legacy claimed to be due her under and by virtue of the will of her grandfather, Wm. Hunter, Sr. It is sought to establish a lien to the amount of the bequest on a certain eighty-acre tract of land owned by Wm. Hunter, Sr., in his lifetime, and of which he died seized.

Erastus B. Hunter, now deceased, was the father of appellee and the residuary legatee and devisee in the will of his father.

Frank Langworthy and J. T. Corbin are the present holders of the legal title to the land through mesne conveyances from said Erastus, the former having acquired title to one forty-acre tract, through conveyances prior to the latter to the other forty-acre tract. Joseph Booher and Jacob H. Warfield are the mortgagees of said land from the said Langworthy and Corbin, respectively, and are made parties herein.

The third and last clauses of the will of the said Wm. Hunter, Sr., is the one under which the appellee claims the right to establish her lien and said last clause reads as follows: "I give and bequeath to my beloved wife, Margaret, all the balance of my estate, both real and personal, during her natural life (including the \$100 bequeathed to my granddaughter, which is to be paid out of the estate when she arrives at the above mentioned age), and at the death of my wife the prop-

erty, then both real and personal, to my son, Erastus B., and I constitute and appoint my son, the said Erastus B., and my neighbor, John W. Bush, executors of this my last will and testament, hereby revoking and canceling all other and former wills heretofore made by me."

The third and preceding clause of the will gave to appellee \$100 to be paid to her when she arrived at the age of eighteen.

The bill and proof shows that there was no personal property left of any considerable amount, and that, while the will was probated, no letters of executorship ever issued and only \$20 of the legacy was ever paid to appellee. It also appears that some eleven or twelve years had elapsed since the appellee came of age before the filing of the bill herein.

The court below found the amount of appellee's legacy of \$100 and accrued interest thereon from November 5, 1875, less \$20 which it found was paid to her, and decreed a lien on said land, and decreed a sale of the whole of the tract or so much thereof as would be sufficient to satisfy said legacy.

That this legacy was a lien on the real estate of the said testator we can have no doubt. The words "I give and bequeath to my beloved wife all the balance of my estate, both real and personal, during her natural life, including the \$100 above bequeathed to my granddaughter, which is to be paid out of the estate when she arrives at the above mentioned age," clearly imply that the testator meant that only the residuum should go to the life tenant and then to the residuary legatee after the widow's death, and that the \$100 should be paid out of the entire estate, the real estate as well as the personal estate.

The words granting the life estate to testator's wife, "including the \$100," etc., only mean that she was to have the life interest in the estate, including the \$100, to the time appellee became of the age of eighteen years. Then it was to be paid out of the estate.

If the life tenant failed to pay it, the residuary legatee should do so out of the estate, and in case both failed, the land should be holden. See construction of similar will in *Gardner v. Gardner*, 3 Mason, 178. We do not understand

Langworthy v. Golden.

that the appellee's claim is barred by virtue of the 15th and 16th sections of Chap. 83 of the R. S., nor by analogy to said statute. The statute of limitations does not apply to a legacy. Angell on Limitations, Secs. 90 and 168; 2 Perry on Trusts Sec. 828; Whiting v. Whiting, 4 Gray, 207; and the appellee was not, under the circumstances, guilty of *laches*. Gibbons v. Hoag, 95 Ill. 45.

We do not find from the evidence that any portion of the land remained in Frances B. Hunter, as is claimed by appellant; hence the point raised by appellant's counsel that such portion should be first sold, need not be considered. There is no description anywhere shown by which such supposed portion can be identified. Langworthy's deed from Frances B. Hunter, who held the title to the entire eighty acres at the time, calls for forty acres off the south end of the said tract, and Corbin's deed, executed by her afterward, calls for the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of same section, being the north part of the same eighty-acre tract.

Presumably the Langworthy forty was the entire half of the eighty, there being no proof to the contrary, and the other description includes all in the governmental division, be the same more or less.

The appellant also makes the point that as between Langworthy and Corbin the land of the latter should be first sold, being in the inverse order of alienation—thus insisting on the rule applicable to mortgages where different parcels have been successively conveyed by the mortgagor. Under the state of the evidence it will not be necessary to inquire whether the rule would be applicable here. There appears no evidence in the record that Corbin had actual notice of the sale and conveyance of any portion of the land to Langworthy at the time of his purchase. And the existence of Langworthy's deed of record would not be constructive notice of the latter's title.

In order that the record of a deed should be constructive notice of its existence, it should lie in the apparent chain of title of the land purchased by the grantee. The deed from Mrs. Hunter to Langworthy is collateral to the chain of title to Corbin's forty-acre tract. It was not in the chain of his

title, and it was not necessary to examine it in order to verify the title to the tract he proposed to purchase.

Under the circumstances Corbin had no notice that Langworthy had acquired title to the south half of the eighty. As to this rule of law, we quote *Iglehart v. Crane*, 42 Ill. 261; *Carbine v. Pringle*, 90 Ill. 302; *Wait et al. v. Smith*, 92 Ill. 385; *Irish v. Sharp*, 89 Ill. 261; *Rodgers v. Cavanagh*, 24 Ill. 583; *Dexter v. Harris*, 2 Mason, 531; *Manly v. Pettee*, 38 Ill. 128.

Notice to Corbin of the deed to Langworthy was necessary even if the lien had been a mortgage, in order to make the rule applicable. *Lock v. Fulford*, 52 Ill. 166.

We are satisfied with the finding of the court below that the money had not been paid. We think there was no sufficient proof of payment of the legacy, except as to the \$20 allowed by the court. Seeing no error in the record the decree of the Circuit Court is affirmed.

Decree affirmed.

ASAD UDELL

V.

HENRY W. HOWARD.

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Exemptions—Sale under Execution—Double Damages—Verdict—Evidence.

1. While a debtor may select articles amounting in value to the exemption to which he is entitled under the statute, he must offer to turn over the balance of his property to satisfy the execution; failing to do this, he can not recover the statutory penalty merely because his choice was not respected.

2. A finding of the court contrary to the decided weight of evidence, is good ground for reversal.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of McHenry County; the Hon. CHARLES KELLUM, Judge, presiding.

Udell v. Howard.

Mr. C. P. BARNES, for appellant.

Messrs. T. D. MURPHY and O. H. GILLMORE, for appellee.

LACEY, P. J. This was an action in trespass brought by the appellee to recover of the appellant the penalty under the statute allowing damages for double the value of the property sold, for selling the personal property of the appellee, which he claims was exempt from levy and sale under execution. The cause was tried by the court and resulted in the finding of the court for the appellee in the sum of \$400, and judgment against appellant for that amount and costs. From this judgment this appeal is taken.

The court, in finding for the appellee the sum of \$400, included a part of the penalty claimed under the statute; for the property sold, as shown by the evidence and claimed in the declaration, to wit, 375 bushels of oats, two sets double harness, one corn sheller and set Howe scales, one grindstone and one pair bob sleighs, nine acres of corn and twenty-five tons of hay, was worth only the sum of \$325, as fixed by the appraisers selected by the appellant, by his deputy, as sheriff, under the statute, at the demand of appellee, and there is no evidence that the property was worth more.

It appears from the pleadings and the evidence that the appellant, as sheriff of McHenry county, held an execution issued out of the Circuit Court of said county in favor of Charles Herrington in the sum of \$496 and costs against the appellee, of date of August 20, 1884.

In October of 1884, the appellant's deputy went to appellee and demanded property. The appellee demanded his exemptions under the statute and being a man of family, residing with the same, he was entitled to his exemptions of \$400. It seems that the sheriff had already levied on the articles in question and possibly some others, before or at the time the appraisers were selected and acted.

But the sheriff yielded to the demand for appraisal and received the appellee's schedule and appointed the appraisers, who fixed the value of all the property mentioned in the

schedule at near \$1,300. There were horses, cows and such things that were not levied on at all, and left in the appellee's possession, of a value of more than \$400.

It seems that the appellee had abundance of property to pay the debt and have the amount of his exemptions remaining, but it seems that he wanted to select the particular property the appellant had levied on and was about to advertise. It will be admitted that under the statute he had a right of choice and selection, provided he turned out or offered to turn out the balance of his property to the sheriff to satisfy the execution.

But where a penalty is sought to be enforced, as in this case, he must bring himself clearly within the provisions of the statute. Did the appellee do this? We think the evidence fails to show that he did. At the time the appraisal was made the appellant's deputy asked appellee what property he wanted to select for his exemption. The latter named over some of the articles that had been levied on till he had gotten about \$400 worth and asked the deputy to give him enough oats to make up the balance.

The sheriff at the time thought he had no right to divide the bin of oats and the matter stopped there for that time. Howard did not at that time offer to turn out any other property in place of that he wanted to select, as we think the evidence shows.

It seems that all the property was left on the appellee's place, none of it being removed. Afterward, before the property in question was advertised for sale, the deputy sheriff, Eberle, in presence of C. Barnes, had a conversation with appellee at his horse barn about the exemptions.

The deputy told appellee that he had come down to see about his exemptions and see if he was ready to turn out the balance of the property in the schedule. As Barnes testified, appellee replied: "I am not prepared to do it now." The deputy sheriff replied he would have to do it then if at all, for he was going to post the notices for sale.

There was no one present but the deputy, Barnes and the appellee. The appellee testifies in regard to this conversation that Barnes and Eberle wanted to know if they would turn

Udell v. Howard.

out \$400 to him if he would turn them out the balance of the property mentioned in the schedule? He said: "I told them I would turn them out what was outside of the mortgage and if I had a right to turn out the balance I would." This, according to his own statement, was an equivocation and equivalent to a refusal. Even if any of the property had been mortgaged, which the evidence does not disclose, the appellee had an interest in it subject to execution and he should have surrendered it or expressed himself willing to do so.

Who could decide whether he had a right to turn it out but himself? The appellee has not been stripped of all his property, but was left his \$400, but not in the particular articles he claims he desired; a large portion of his debt has been paid by the sale, and when he seeks to recover a heavy penalty, merely because his choice has not been respected, he must, as we have before said, bring himself clearly within the provisions of the statute. He must be the actor and turn out or offer to turn out all his property not selected, thus bringing himself within the provisions of the statute. *McMasters v. Alsop*, 85 Ill. 157.

As to the claim which appellee sets up, that he offered to turn out the balance of his property at the time of the attempted selection when the appraisement was made, we can only say that the decided weight of the evidence seems to be against it; yet if he did, at that time, make such an offer, he must not afterward, before the property is delivered to him, withdraw it by refusing to do it or in doing what was equivalent to a refusal, as he did on the occasion of the last conversation.

Because the finding of the court is contrary to the decided weight of the evidence, the judgment will be reversed and the cause remanded.

Reversed and remanded.

MOSES CASLER ET AL.

V.

ASAHEL B. BYERS.

Mortgages — Foreclosure—Correction of Erroneous Description—Re-acknowledgment—Homestead—Dower—Failure to Release—Estoppel—Solicitor's Fees—How Ascertained.

1. Upon a bill to foreclose a mortgage, it appearing that, owing to the omission of the word "one," the description read, "township forty — (41)." to correct which supposed error the word "one" was inserted with the consent of the mortgagor and wife, after which the deed was re-acknowledged, no reference to a release of homestead or dower being made in the notary's certificate, it is *held*: That the mortgagors were entitled to no homestead as against the mortgagee; that the amendment added nothing to the force of the mortgage; that the omission was simply an ambiguity which might have been explained by oral testimony; and that the correction related back to the original making of the mortgage, no new acknowledgment or record being necessary.

2. In the case presented, the appellant having persuaded appellee to make advances upon certain statements of fact, of a large amount of money for his benefit, he is estopped to deny the truth of such statements.

3. What is a reasonable solicitor's fee in a given case is a question of fact to be determined by the weight of the evidence. In the case presented an allowance of \$500 is sustained by a majority of the court. Smith, J., dissents, on the ground that the allowance is exorbitant, and the mode by which it was ascertained, illegal.

[Opinion filed December 8, 1888.]

IN ERROR to the Circuit Court of Winnebago County; the Hon. O. H. HORTON, Judge, presiding.

Mr. HARVEY A. JONES, for plaintiffs in error.

Mr. WILLIAM LATHROP, for defendant in error.

C. B. SMITH, J. This was a bill filed by Asahel B. Byers, appellee, against Moses Casler and his wife, Catherine M. Casler, appellants, to foreclose a mortgage. The material facts appearing in this record are these:

Casler v. Byers.

On the 8th day of April, 1876, Moses Casler executed his note to Richard L. Devine for \$3,350, and on the same day Casler and his wife, to secure the note, executed their mortgage to Devine, conveying thereby the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section No. 8, and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, section No. 9, all in township 41 north, range 3, east of the 3d principal meridian, containing 120 acres.

This mortgage and its acknowledgment contained a proper release of dower and homestead, and contained a power of sale. The note was due in five years and drew ten per cent. interest, payable annually. In December, 1879, Devine discovered what he supposed was an error in the description of the township in the mortgage. The printed portion of the mortgage gave the township thus, "forty——;" but the figures in writing immediately following the word "forty" and the blank were thus, "(41);" so that the whole description as to the township was thus: "township forty——(41)." The land was in fact in township forty-one. On discovering this supposed error, Devine took a notary and called on Casler and his wife, and obtained their consent to correct the error by writing the word "one" in the blank after "forty," and then had the mortgage re-acknowledged; but the notary, in writing out his certificate, omitted all reference to any release of homestead or dower, and the mortgage was again recorded.

After the note and mortgage became due Devine advertised it for sale, in default of payment under the power conferred in the mortgage, and in his advertisement recited the amount due November 1, 1881, at \$5,042.86. Casler became alarmed lest he should lose his farm and appealed to Byers to help him. The farms of these two men adjoined. Byers was a man of considerable means, with a large farm, and a neighbor of Casler. Casler told him they were going to sell him out. Byers told him he would see what he could do for him. Byers did not have the money but went to, one R. D. Rowen to see if he could borrow it. He succeeded in borrowing \$4,000 of Rowen with the promise of getting \$500 more in the spring. Casler had agreed to reduce the amount of the mortgage to \$4,500, if Byers would help him. Casler bor-

rowed the other \$500 from Updike. At the time appellee applied to Rowen for the loan he asked Rowen to take the loan himself, but Rowen was then about starting to California and said he had no time to attend to it, but would take the loan himself in the spring when he returned, if the security was satisfactory; and Byers then expected to be relieved of the loan to Casler in the spring. When the parties met at Devine's to pay him his money and transfer the note and mortgage to appellee it was found that Casler could not reduce the amount of the mortgage to \$4,500, and that he lacked \$84.80 of having enough. Appellee loaned him this amount also, with an agreement that it should be paid back in thirty days, but it has never been paid.

Aside from this mortgage made to Devine by Casler, it appears that there were other dealings between these two men which had been running for years, and that Casler had executed chattel mortgages to Devine at different times to secure debts, and it also appeared that Devine had taken judgments against Casler, and that there were unsettled dealings between them up to the day of the transfer of the note and mortgage to appellee. The mortgage became due April 8, 1881. On March 10, 1881, the evidence shows that Casler and Devine then had a settlement of their affairs and reduced the result to writing and signed it. By this settlement Casler owed Devine, including the amount of the mortgage, \$4,855.

Again, on November 23, 1881, when Devine, Casler and Byers were all together at Devine's bank, the account was all gone over between Casler and Devine in the presence of appellee, and the precise amount due on the note and mortgage again agreed on and reduced to writing and signed by Casler, wherein it is stated that the precise amount due on said note and mortgage is \$4,500, neither "more nor less," and this agreement was given to appellee as the true amount due on the mortgage which he was buying for the sole benefit of his friend and neighbor Casler, and to save his farm from being sold; and to further accommodate him he extended the time of payment of the mortgage for five years and reduced the rate of interest from ten to seven per cent. After this settlement,

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then, appellee paid Devine the \$4,500 and took an assignment of the note and mortgage. After this arrangement was completed, Casler requested appellee to keep the note and mortgage himself and not let Rowen have it. He again complied with this request.

When the note and mortgage became due it was not paid and this bill is filed for the foreclosure of that mortgage.

The defendants, Casler and his wife, answer the bill and deny that they requested appellee to buy the note and mortgage and deny that they agreed that any particular sum was due, and allege that, at the time appellee bought the note, there was an unsettled account between Casler and Devine and that appellee knew it at the time of his purchase, and deny there is now due on said mortgage \$4,500, or any interest thereon to appellee, and allege that while the note was in Devine's hands Casler had paid \$2,500 on the note and that appellee knew it. There is no claim of homestead set up in the answer. The case was referred to the master who took the evidence and reported it back to the court. The case was heard on bill, answer, replication and proofs taken, and a decree rendered for complainant in conformity with the prayer of the bill for the amount due on the note and mortgage and \$500 solicitor's fee. Appellants have brought the record here for review.

Appellants first assign for error that the court erred in not decreeing that they were entitled to a homestead as against such mortgage. This claim is based on the assumption that the mortgage as it was first executed did not cover the land in township 41, and that after it was amended by inserting the word "one" after "forty" there was no new acknowledgment waiving homestead. There is nothing in this objection. The mortgage covered the land in dispute as it was first executed and needed no correction. The amendment added nothing to the force of the mortgage except possibly to save calling a witness, some time, to show which land the Caslers owned. The mortgage in fact covered land in both townships, and where a deed or mortgage may admit of two constructions the grantee is at liberty to select the one most favorable to himself. *Sharp v. Thompson*, 100 Ill. 447.

At least it was but an ambiguity, which might be explained by oral testimony on the trial, and the mortgage located on the right land. But if there was any defect of description Casler and his wife corrected it at once upon their attention being called to it. This correction would relate back to the original making of the mortgage and needed no new acknowledgment or recording.

Appellants next urge that they were not estopped to show what the real amount due on said note and mortgage was, even in the hands of appellee. They claim the right to go back and show payment of all or a large part of this mortgage to Devine while he held it. That they can not be permitted to do this now, under the facts in this record, is too plain for argument. The proof is clear and uncontradicted that Byers bought this mortgage at the request of the defendant Casler to save his farm for him; that he himself had to borrow all the money to do it; that he made not one cent in the transaction and did not desire to do so; that it was a pure act of grace and friendship. He knew nothing at all about the dealings between Devine and Casler except that Casler told him that Devine had advertised his farm for sale, and stated the amount in his notice at over \$5,000. That was the amount Casler wanted. Appellee told him he could not raise so much but that if he could reduce it to \$4,500 he would see what he could do for him. Before appellant paid his money and took an assignment, he had Devine and Casler make a settlement of their affairs and had them decide for themselves the exact amount due on this mortgage and to put that question forever at rest, he required them to put it in writing and Casler signed it. In addition to this guaranty of the correction of the statement here shown is another statement in writing made inside of a year before, also signed by Casler, showing there was then due on said mortgage \$4,855. To permit him now to come in and deny his solemn admissions and declarations made to Byers and to induce Byers to act upon them and to rely upon their truth and to advance a large amount of money for appellant's benefit, would be to perpetrate a gross fraud and allow appellant to take advantage of his own wrong. The

doctrine of estoppel is that where a person by his words or conduct voluntarily causes another to believe in the existence of a certain state of things and induces him to rest on that so as to change his previous condition he will be estopped to aver, against the latter, a different state of things. *The People ex rel. v. Brown*, 67 Ill. 435. Under the uncontradicted facts in this case the doctrine of estoppel applies to the fullest extent, and in the view we take of the case it is wholly immaterial what the state of accounts may be as between Devine and Casler.

The majority of the court are of the opinion that there is no ground for reversal on account of an excessive attorney's fee. The appellee had loaned his money to take up a mortgage at the request of Casler, as an accommodation, and the mortgage contained a provision for the payment of a reasonable attorney's fee in case it had to be foreclosed. It was necessary to foreclose it, and the appellee, on account of the factious opposition of Casler, the maker of the mortgage, was compelled to pay out a large amount for attorneys. The amount of their fee was ascertained by resort to the evidence of two attorneys, who testified that a reasonable amount for solicitor's fees in the case was \$500, and the appellee cross-examined the witnesses, but failed to introduce any rebutting evidence. Under such evidence, we are of the opinion that we can not absolutely say the fee was not reasonable. As was well said in *Lamar Ins. Co. v. Parnell*, 19 Ill. App. 212, "what is a reasonable attorney's fee, in a given case, is a question of fact to be determined, like others, by the weight of evidence. * * * The subject being in its nature matter of opinion, whatever might be our own, independently of that of others given under oath and cross-examination, it would be unreasonable, arbitrary, and against well settled precedent to reverse the decree of this finding upon the evidence." We fully concur in this view. In the case of *Reynolds et al. v. McMillan*, 63 Ill. 46, in which the court condemned the manner of allowing witnesses to express an opinion as to what was a reasonable attorney's fee, it must be remembered that this was under a special statute, and in that case minors were interested, and

every objection that can be made is held in their favor. The court say: "Infants are the peculiar care of chancery, and courts should not hesitate to protect them against exorbitant fees."

In the case at bar the appellants are of full age, and if they were not satisfied with the testimony as given by the witnesses as to the basis on which they formed their opinion as to \$500 being a reasonable attorney's fee, they could, and it was their duty to, cross-examine and fully ascertain upon what such opinion was based. No objection was made to the evidence at the time and no witnesses introduced to contradict it.

We all concur in affirming the decree in all things except as to the allowance of \$500 as solicitor's fees, and upon that question the writer of this opinion dissents from a majority of the court, and, hereafter speaking for himself only, is of opinion the decree ought to be reversed upon that point, and remanded, with directions to allow a reasonable attorney's fee in conformity with the language of the mortgage. I hold that the allowance of \$500 is extortionate and oppressive, and that there is nothing appearing in this record to justify any such fee. In my opinion it amounts to judicial robbery. The excuse urged by counsel for appellee for this part of the decree is that the defendant made a bitter and long fight. This he had a legal right to do, and for this luxury he is justly compelled to pay all the costs of both parties.

The legal questions involved in the case were of the simplest character. The bill was filed February 28, 1887, in De Kalb County, and in April, 1887, on motion of defendant, the venue was changed to Winnebago and a trial had at the October term, and a decree rendered October 26, 1887. Less than eight months intervened from the beginning to the end of this suit; a much shorter time than is usually occupied in disposing of a controverted chancery suit. From five to ten days would have been ample time to take all the evidence before the master and the record shows that only eight days, in fact, were consumed.

No great legal skill or learning was needed at any stage of the case. But I hold that the court proceeded erroneously in

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the ascertainment of the amount it would allow, and the mode adopted here has been expressly prohibited by the Supreme Court in the case of *Reynolds v. McMillan*, 63 Ill. 46. That was a case in partition under the statute. Section 40 of that statute provides that in amicable proceedings for the partition of estates, the court may allow a reasonable solicitor's fee to be charged as costs among the parties in interest. In that case it was proper to allow the fee, and in order to determine what a reasonable solicitor's fee was, the court allowed witnesses to testify and give their opinions as to what was a reasonable fee, and they gave it as their opinion that \$1,000 was a reasonable fee for such services.

The Supreme Court very properly held, first, that the method of their finding what a reasonable fee was, was erroneous, and held that the proper question was "what is the usual and customary fees for such services;" and second, that \$1,000 was an exorbitant and excessive fee; and for the allowance of that fee the cause was reversed. In the case before us the mortgage provided for a reasonable solicitor's fee in case of foreclosure, using precisely the same language as the statute. The court, in both cases, must ascertain what is a reasonable fee, and I know of no reason why the mode adopted in the one case for ascertaining that fact, should be different from the mode adopted in the other.

In the case at bar appellee called two witnesses only, to prove the fees. The following question was asked both of them: "What, in your judgment, would be a reasonable attorney's fee to be allowed in this case to the complainant for the foreclosure of this mortgage, judging from the amount involved and what you saw of the papers, and depositions taken in the case? The amount claimed by complainant is something over \$5,000. The papers will show that about eight days time has been spent in taking depositions in this case and that the venue was changed from De Kalb to this county."

The first witness answered that he had practiced law nine years and that \$400 or \$500 would be a reasonable fee.

The second witness answered that he was a lawyer since 1865, and that \$500 would be a reasonable fee. The court

selected the highest figure. These questions and answers come precisely within the method adopted in Reynolds v. McMillan, *supra*, and which were then held erroneous. The same rule was followed by this court in Dorsey v. Corn, 2 Ill. App. 533. In this latter case the court go farther than the Supreme Court and say that the chancellor should not be governed alone by the opinions of attorneys, but should exercise his own judgment and sense of justice in the allowance of fees. I differ from the majority of the court with reluctance, but I am so firmly convinced that that part of the decree allowing \$500 for solicitor's fee is illegal in its mode of ascertainment and directly contrary to the rule of this and the Supreme Court, and also that it is excessive and exorbitant in amount, and so abhorrent to my sense of justice, that I must, with great deference to my brethren, enter my protest against it. The decree is affirmed by a majority of the court.

Decree affirmed.

WILLIAM T. IRWIN, ADMINISTRATOR,

V.

MARY WOLLPERT ET AL.

Wills—Annuity—Bill by Administrator to Enforce Payment—Real Property—Conflicting Titles—Parol Agreement to Convey—Evidence.

1. The law does not allow an administrator to engage in litigation to settle conflicting titles. He must take and deal with the title as he finds it.

2. It is well settled that a claim of title based upon a parol agreement must be supported by evidence both clear and satisfactory, particularly when the claim is an old one.

3. Upon a bill filed by an administrator to enforce the payment of an alleged balance of an annuity which was originally charged upon two lots, one of which was conveyed prior to the death of the annuitant, who joined in the conveyance, this court affirms the decree of the court below dismissing the bill for want of equity, the annuitant having had control of and derived all the income from the premises, either by herself or her agents, during her lifetime.

[Opinion filed December 8, 1888.]

SECOND DISTRICT—DECEMBER TERM, 1887. 137

Irwin v. Wollpert.

APPEAL from the Circuit Court of Peoria County; the Hon. S. S. PAGE, Judge, presiding.

Messrs. KELLOGG & CAMERON, for appellant.

Messrs. DAN. F. RAUM and N. ULRICH, for appellees.

C. B. SMITH, J. This is a bill filed by Wm. T. Irwin, administrator of the estate of Christiana G. Young, deceased, against Mary, John and Charles Wollpert, her grandchildren. Christiana G. Young was the widow of George Matthaues Young, who died testate in April, 1873, seized in fee simple of lots one and two, block sixty-six, in Monson & Sanford's addition to Peoria.

By his will George Matthaues Young devised lot (1) to his son, Gottlieb M. Young, in fee, and lot two (2) he devised in fee to Mary, John and Charles Wollpert, minor children of his deceased daughter, Julia C. Wollpert. In a subsequent clause of his will he charges these two lots with a three hundred dollar annuity, clear from all taxes and improvements, to be paid to his wife, quarterly, every year during her life, and provides that in case this annuity is not paid promptly that she may take possession and collect rents for herself.

Christiana Gottlieb Young died in 1886, and Irwin was appointed her administrator. This bill is now filed to enforce payment of, what is claimed, an unpaid balance due of said annuity, and to make it a charge against said lot two; lot one having been conveyed by the deed of the widow herself, her son joining with her, so that no demand can be made against it. It is alleged in the bill that at the time of the widow's death there was a large sum, amounting to \$3,000, still due, which had accrued to her as a part of her annuity, and which had not been paid to her nor to any person for her during her lifetime. The answers admit the allegations of the bill except as to there being anything yet due, and as to that they say that the widow, in her lifetime, had been largely overpaid, and that she had, in fact, taken possession of both lots shortly after her husband's death, and either by herself or her agents, had

received all the rents during her lifetime. Susannah Young, wife of Gottlieb M. Young, who was also made a defendant to the original bill, answers that she had a claim against the estate of Christiana G. Young for care, boarding and nursing for a number of years prior to her death, and she also claims in her answer that she had a parol contract with George Matthaues Young in his lifetime to the effect that if she would build a house on lot one, she should have the lot, and that in pursuance of such contract she built the house with her own money at a cost of \$2,000, and that by that means made the only rental value the lot had; and she further insists that she never received any rents therefrom nor anything from the mortgage put on it. The bill was dismissed as to Susannah Young and M. Scherff. The case was referred to the master, with direction to take the evidence and report conclusions, which he afterward did, finding against the complainant in the bill, and finding that Christiana G. Young had had the possession and control of both lots either by herself or her agents, and had collected and received rent and profits therefrom largely in excess of her annuity, during her natural life, and that there was nothing due her. Exceptions were taken to the master's report and overruled by the court. Thereupon the complainant asked and obtained leave to amend his bill. The bill was so amended as to allege a *claim of ownership in fee* only, in George Matthaues Young, of lot one (1), at the time of his death and making the will, but that in fact the equitable fee in said lot one was in Susannah Young at the time of the death of George Matthaues Young, by reason of the agreement between the said George M. and Susannah Young, which said agreement was in substance as follows: That in the lifetime of George M. Young, deceased, he made a verbal agreement with Susannah Young, wife of Gottlieb M. Young, now also deceased, to give, grant and convey said lot one in block sixty-six to said Susannah Young, if she would cause to be built a dwelling house thereon, and that the said Susannah Young, in the lifetime of George M. Young, fully performed her part of said agreement by causing the house to be built with her own money, not derived from her husband, at a cost of

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\$2,000 and that she entered upon and took possession of said house and kept possession of the said house and lot until it was sold under a trust deed in 1879, which had been executed by Susannah Young, her husband, and Christiana G. Young—all joining in the deed. The amended bill further averred that by reason of such agreement and the building of said house, the equitable fee passed in the lifetime of George M. Young to said Susannah Young, but that said George M. Young never, in his lifetime, performed said agreement by making a conveyance of said lot onto said Susannah Young, nor have his legal representatives since his death.

Wherefore complainant prays that the fact of said agreement to convey may be considered in connection with the relief prayed for in the original bill, and that the said unpaid annuity may be decreed a lien accordingly upon said lot two (2), and for other and further relief, etc.

Mary Wollpert, in her answer to this amended bill, denies every material averment in it, and in addition to her denial pleads the statute of frauds and relies on the same, as against the parol agreement set up in the amendment.

She further answers and says that Christiana G. Young accepted the provisions and terms of the will, and thus treated her husband as the owner in fee of said lot one (1), and that her administrator is now estopped from saying he was not the owner. Charles and John Wollpert make substantially the same answer as their sister Mary to the amended bill. We regard this amendment and all proceedings under it as wholly foreign to the original purpose of this bill. It was an attempt by the administrator to do indirectly what he could not do by a direct proceeding, viz., to settle and adjust the title to lot one as between Susannah Young and her husband or his heirs, he being dead, and none of them then being parties to the bill. The bill had before then been dismissed as to Susannah Young, and her husband was dead, and if they had children they were not made parties. The law does not allow an administrator to engage in litigation to settle conflicting titles. He must take and deal with the title as he finds it. The court could not release lot one from this claim set up, for

unpaid annuity, without first deciding the title was not what it purported to be, and was not in fact in George Young at the time of his death. But while we do not recognize the propriety of this amendment, and do not wish to be understood as giving it our approval, still, we have treated it as though properly made, and have considered the evidence offered under it as court and counsel treated it below. We have carefully studied the evidence in this record and are entirely satisfied with the finding of the master and the decree of the court. After the death of her husband, sometimes the widow, Christiana C. Young, herself collected and received the rents of both lots, and had the actual and exclusive possession of both of them. While she was thus receiving the whole rents of both lots, her son Gottlieb and his wife, Susannah, wrote her to make her home with them, at White Rock, Illinois, whither she went, and from that time until her death she lived with her son and his wife, until she died, as a member of the family. After the mother went to live with her son he collected all the rents on both lots up to the time of his death, in April, 1881, except as to lot one, for which he received rents only until 1879, when it was sold, and after the death of Gottlieb Young the mother still resided with Susannah until March, 1886, when she died, and during all that time Susannah Young collected all the rents from the remaining lot two. The evidence discloses that Gottlieb and his wife together got all the rents until after the death of Christiana G. Young, and that they were acting as her agents with her knowledge and consent, and that they got the benefit of all this money for the keeping of Christiana. The mother was undoubtedly a source of great care to her son and his wife. They were giving her a home and feeding and clothing her and meeting all her wants. She knew her son was attending to her property and collecting not only her annuity of \$300 a year, but, in fact, collecting all the rents, amounting to good deal more than that, and that it was all appropriated by the family. We think there can be no reasonable doubt but that she secured all her legal demands against these lots and much more, at the hands of her son act-

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ing for her, and as her agent, with her knowledge and consent.

We do not think the claim made by Susannah Young that she bought lot one in consideration that she would build a house on it, is sustained by the proof. The subsequent conduct of herself, her husband, and of George Matthaus Young and his widow, all strongly contradict that claim. At all events, she claims only through a parol agreement of purchase. The law is well settled that where such a claim of title is set up, the proof must be clear and satisfactory and free from substantial doubt, and more especially so when the claim is a very old one, as in this case, over twenty years having elapsed since it is claimed this parol contract was made. *Wood v. Thornly*, 58 Ill. 464; *Langston v. Bates*, 84 Ill. 524. But under the undisputed facts in this case, the hardship to Susannah Young in expending \$2,000 to build a house on this lot one (1) is not so great as contended. In the first place, instead of the deed being made to her, as she now claims it ought to have been done, it was given to her husband by will. She, with her husband, shared the rents accruing from the house for a number of years, and until she, her husband and Christiana G. Young all joined in a trust deed, and borrowed \$2,000 on the lot, which was paid to her husband. She undoubtedly shared with her husband and her family the benefits of this money. They would still own the house and lot had they chosen to pay the trust deed and redeem the lot. The manifest purpose of this bill is to raise a fund out of lot two (2) to pay a claim set up against Christiana G. Young's estate by Mrs. Susannah Young, for keeping the old lady during her residence with her own son, at his invitation, and covering a period when Gottlieb M. Young, the husband of Susannah Young, was receiving all the rents and profits of both lots one and two, and appropriating them to the support of his mother and family. The proof is that the Wollpert children have never received a cent of rent from the lot given them by their grandfather in 1873, but, on the contrary, they have been compelled to pay some of the taxes.

With the exception of, perhaps, a year or so, Gottlieb Young

and his wife have received every dollar of rent paid on this lot No. 2 from 1873 until 1887, besides also receiving all the rent on lot one from 1873 to 1879, for which they have rendered no consideration except furnishing a home in their own family for Gottlieb's own mother and at their own solicitation. The total amount received by both of them over and above taxes and repairs is shown to be \$3,917.55. This amount would allow them six dollars a week for the care and board of Mrs. Christiana G. Young for the time she lived with them, covering a period of about thirteen years.

The proof not only shows that Gottlieb Young and his wife were the actual and only agents of Christiana G. Young and received for her more than her annual annuity, but it also shows that the purpose of this suit is simply to raise a fund to again pay Susannah Young for keeping her mother-in-law.

We are unable to find any merit or equity in the case and the decree of the Circuit Court dismissing the bill is affirmed.

Decree affirmed.

OLE M. TOMLE
V.
LEAH J. HAMPTON.

Personal Injuries—Defect in Sidewalk Built on Private Property—Action against Owner for Damages—Nuisance—Damages—Measure of—Instructions—Comparative Negligence—Landlord and Tenant.

1. To the general rule that the landlord is not liable where a third person is injured through a failure to keep in repair premises occupied by a tenant, there are two exceptions: first, when the landlord agrees to keep the premises in repair; second, where the premises were erected with a nuisance upon or connected with them. by means of which the injury complained of occurred.

2. A person who has made a public sidewalk upon his own premises, can not be heard to say, an injury having occurred through a defect therein, that it was not a public way.

3. An unprotected opening in a sidewalk, ten inches wide and five feet long, is a nuisance *per se*.

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4. In the case presented, it is *held*: That the appellant can not complain of an instruction setting forth that, if plaintiff was guilty of some negligence, yet if it was slight and the defendant's negligence was gross, when compared with each other, the plaintiff might still recover; that an instruction given by the court on its own motion, though in part irrelevant, states correct propositions of law, and did not mislead the jury; and that the court properly refused to give certain instructions for the defendant, prepared on the theory that the landlord would not be liable if the premises were, at the time of the accident, in possession of a tenant.

5. In actions to recover damages for personal injuries, there is no inflexible rule as to the measure of damages, except that the recovery is limited to compensation for injury and suffering. What is a proper allowance in a particular case, rests in the sound discretion of the jury, subject to review and correction by the court in case of the abuse of such discretion.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

Mr. CHARLES WHEATON, for appellant.

Messrs. A. J. HOPKINS, N. J. ALDRICH and F. H. THATCHER, for appellee.

C. B. SMITH, J. This is an action on the case brought by Leah J. Hampton, a minor, by her next friend, against Ole M. Tomle, the appellant, to recover damages for an alleged injury to plaintiff caused by the alleged negligence of the defendant. The declaration contains several counts. The *gravamen* of the charge is that for ten years last past the defendant owned a business house on the south side of Wilson street, one of the most public streets in the town of Batavia; that the front of said building was abutting the sidewalk along the line of Wilson street; that on the front line of said building there was a glass show window, and that on the front of said building there was an uncovered opening in the sidewalk adjacent to the front wall and running along with the wall and under the show window a distance of five feet in length and ten inches wide; that the hole, when left open, uncovered a vault

or cellar below to the depth of ten feet, and that the defendant had negligently maintained the building for ten years in that dangerous and unsafe condition and rented it to persons for business purposes.

That at the time of the injury complained of it was rented to Vincent & Patchin for a valuable consideration for the purpose of a drug store, and that the plaintiff, in the night time, was sent to the drug store by her parents on a lawful errand, and while looking in the show window at the articles there displayed she fell into and through the opening in the sidewalk, while using all due care, and was injured.

The defendant pleaded the general issue. A trial was had resulting in a verdict for the plaintiff for \$2,000, and after overruling a motion for a new trial the court rendered judgment on the verdict. The defendant brings the case here on appeal and assigns the usual errors. In considering the case we shall consider only such assignments of error as have been relied upon by appellant in the argument.

There seems to be no substantial dispute as to the facts, except so far as they relate to the character of the injury received by the plaintiff. The record discloses substantially this state of facts: Appellant was and is the owner of a block consisting of three store buildings in Batavia, fronting on Wilson street, which runs east and west through the town. When this block of buildings was erected the front line of the block was set back from the inside of the sidewalk about six feet, and upon this intervening space between the sidewalk and the front of the buildings the defendant had placed stone flagging up to the front of his buildings, and a little above the edge of the sidewalk, and thereby covered all the open space except the hole before referred to, and increased the width of the public sidewalk that much.

Prior to this injury one Geis occupied the store west of the one involved in this controversy, appellant himself occupying the one next east of it for a furniture store. Vincent & Patchin occupied the drug store as the tenants of appellant, before and at the time of the injury, under a written lease. This written lease contained no provision requiring appellant

to keep the building in repair. Under the drug store and under this opening in the sidewalk was a cellar and excavation about nine feet deep. The cellar was used for the purposes of the drug store and the opening in the sidewalk for light and ventilation to the cellar.

The lower end or bottom of the show window was about eight inches above the level of the walk under the window, and the molding at the bottom of the show window projected out from the surface of the wall about two and one-half inches. Ten years ago there was a board walk immediately fronting this drug store and a railing was then built around this opening in the walk to protect people from getting into it.

Defendant tore away the board platform or sidewalk and the railing around the opening and replaced the boards with stone flagging, but did not replace the guard or railing around the opening he then left; nor did he then or since, up to the time of the injury, place any kind of guard or protection over or around it.

Immediately after plaintiff was hurt he nailed a board over it. This opening was not absolutely necessary either for lighting or ventilating the cellar, although it aided in lighting. There were other openings in the cellar which lighted and ventilated it. The six feet between the sidewalk and the front of the store belonged to the defendant, and the stone flagging was put there by him for the purpose of showing and displaying goods, and it was certainly used by the public just as the sidewalk was used in passing along in front of the stores as well as the approaches to them. The drug store and cellar were in the possession and control of Vincent & Patchin and had been for two years prior to the accident, under a lease from the defendant, and they were paying him rent.

This was the condition of things at that place on the night of the 10th of October, 1883. On that evening, after dark, the appellee, then a little girl nine years old, was directed by her father to go with her brother, a little older than herself, to this drug store, to buy a bottle of Pond's Extract. As they approached the store the appellee noticed several men in the

store and wanted her brother not to go in until the men went out, and while thus waiting they were both attracted to this fatal window to look at a silver butter dish with a picture of a cow on it. Upon stepping up to the window the appellee, not seeing the hole in the sidewalk by reason of the darkness, stepped into it and fell to the bottom of the cellar upon some stone flagging. Up to this point there is no dispute about the facts as we have recited them.

Appellee claims that in falling she received serious and permanent injuries; that she suffered greatly for a long time and was compelled to remain in the house and in bed for a long time and afterward go on crutches, and that she could not go to school for six months or more, and that one limb is now shorter than the other, and that when lying on her right side she has no control of her urinary muscles and that there is an involuntary discharge of urine; that she has never been well since the hurt and that before the hurt she was a healthy and sound child. This condition of plaintiff is supported by several credible witnesses. The defendant, on the contrary, urges that her injuries are but slight and that no permanent injury came to her, and that appellee and her family are "shamming" for the purpose of extorting a large amount of money from the defendant.

The verdict seems large, but there is ample proof in the record to support appellee's claim as to the character of the injury and the nature of her sufferings to justify the jury finding her injuries to be permanent. There is no inflexible rule to measure the damages in such cases, except that it be for compensation for injury and suffering, and its ascertainment must rest in the sound judgment of the jury upon the facts in each particular case, subject, of course, to review and correction by the court for abuse when the court can clearly see that the jury have been governed or influenced by improper motives, such as passion or prejudice, or have clearly mistaken the facts in the case. We can not say in this case that the jury have so far departed from their duty as to justify us in setting aside the verdict on that ground. But the chief contention, in this case, of appellant, is not so much against the

amount of the verdict as against the right of plaintiff to recover at all. Counsel for appellant contends very earnestly in a very elaborate argument that the plaintiff can not recover upon the admitted facts in this case, and bases this contention on the fact that the appellant was not in possession of the building and had no control over it, and owed no duty to the plaintiff in regard to the opening in the walk, and that if there is any liability it is upon the tenants. He contends that it was the duty of the tenants to keep the building in safe repair. The general rule in cases of accident happening to third parties on account of failure to keep the premises which are occupied by tenants in repair, is that the landlord is not liable. But there are two well recognized exceptions to this rule:

1. When the landlord by express agreement with his tenant agrees to keep the premises in repair.

2. If the premises are erected with a nuisance upon or connected with them by means of which the injury complained of occurred, then the landlord is liable.

In this case there was no agreement to repair and if the defendant is liable it is under the second exception to this rule.

In *Gridley v. The City of Bloomington*, 68 Ill. 47, a flagstone placed over a vault in the sidewalk by the landlord, was broken, and it was replaced by a defective covering put there by the tenant. The injured party brought suit, but the landlord was held not liable because he did not make the defective walk.

In *Miller v. Morrell*, 126 Mass. 545, the tenant occupied a house a little back from the street, and a walk led from the street to the house. The injured person was calling on the tenant at night to collect or settle a bill, and in approaching the house he fell off the walk and was injured for want of railing or a light to keep him on the walk. There was no defect in the walk itself. The landlord was held not liable.

In *Bryan v. Williams*, 87 N. Y. 471, the tenant occupied a building for laundry purposes run by steam from a shaft run through the building. The tenant erected for his own convenience a partition wall running near the shaft. The injured party was passing between the wall and shaft and was hurt and

the landlord was held not liable. The court then uses this language: "*A lessor maintaining structures not per se a nuisance, but which become so only by the manner in which they are used by the lessee, is not liable therefor.*" Citing *Swords v. Edgar*, 59 N. Y. 28; 87 Pa. St. 475 and 126 Mass. 545.

The foregoing cases sufficiently illustrate the rule that the landlord is not liable when the original structure was not *per se* a nuisance.

The distinction recognized in the above cases, however, seem to have been disregarded in *King v. Thompson*, 87 Pa. St. 475. The facts in that case were almost literally like the facts in the case at bar. A hole sixteen inches wide and three feet long was left in the sidewalk unprotected, in front of a building and in front of a cellar window, for the purpose of light and ventilation. An injury occurred to a person walking into the hole and the landlord was sued, but was held not liable. The ruling in this case can only be harmonized with the general rule stated upon the ground that the court did not regard the hole in the sidewalk as a nuisance *per se*.

But whatever the rule may be in England and in other States we regard the law as well settled in this State, that when a landlord leases premises with a nuisance *per se* attached to them, and an injury results to a stranger, without his fault, then the landlord is liable.

In *Stephani v. Brown*, 40 Ill. 428, the injury resulted to Brown by falling through a defective grating in the sidewalk. Stephani owned certain premises in Chicago, and for his own convenience and without the authority of the city raised the sidewalk in front of his building and dug a vault under it, and put a wooden grating over a part of the walk in front of the window in the building and adjoining the wall for the purpose of light and ventilation. Afterward defendant, being the owner, leased the premises to a third party, and while the tenant was in possession the plaintiff, in passing along the sidewalk, stepped upon the grating, which, being defective, gave way, and she was precipitated into the vault below and was injured.

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It will be seen that the facts in that case were more favorable to the owner of the premises than in the case before us. In that case the owner put a wooden grating over the opening he made in the sidewalk. In the case before us no covering was put over the hole. The same defense was made there that is urged here with so much earnestness. It was contended that if there was any liability it was on the tenant and not the landlord. But the court held that whoever does anything either on, above or below the street surface to render its use dangerous or hazardous without lawful authority, is guilty of a nuisance, and that persons who suffer injuries therefrom without their fault have a remedy against the author or person continuing the nuisance.

Mr. Justice Breese in giving the opinion of the court in that case further says: "The principal ground of defense relied on by appellants is that they were not in possession of the premises at the time of the accident, but they were leased to Schonthaler, who then was the actual occupant, and therefore they were not responsible. The proof shows that appellants built the sidewalk as it was at the time of the accident; they were therefore the authors of the nuisance, and, leasing the premises to another, being such authors, they are in law guilty of continuing the nuisance. *Wagoner v. Germaine*, 3 Den. 306."

In *Gridley v. Bloomington*, 68 Ill. 47, the court expressly recognize the authority in *Stephani's* case and refer to it with approval. And again in *City of Peoria v. Simpson*, 110 Ill. 294, the court say: "The owner is liable, if at all, because the premises were let with the nuisance upon them, and that liability, if any existed, continued notwithstanding the possession of the tenant, and continued up to the time of the accident." The same defense was urged there as here, that the owner was not liable because the premises were leased and in the possession of tenants. This defense was overruled, although the case was reversed because of an erroneous instruction.

In *Reichenbacher v. Pahmeyer*, 8 Ill. App. 217, the defendant built a hotel and leased it to a tenant. Before leasing the

hotel the defendant had suspended a chandelier from the ceiling of one of the rooms in so defective and unsafe a manner that, after the tenant took possession and was using it, the chandelier gave way and fell upon the plaintiff, injuring him, while he was using due care. The landlord was sued and made the defense that if any liability existed it was upon the tenant and not upon him, but the court overruled the objection and followed the rule in Stephani's case.

The same rule was followed in *The Union Brass Manufacturing Co. v. Lindsay*, 10 Ill. App. 583.

The foregoing cases decided by our Supreme Court and by this court are all in point, and are conclusive against the appellant and binding upon us. Appellant seeks to escape the force of these decisions upon the ground that the walk immediately in front of his buildings in which the hole was made was upon his own ground, some six feet from the inside of the sidewalk. But this can avail him nothing. He saw fit to make a public sidewalk upon his own premises and invite the public to his stores to trade and to see his wares, and he can not now be heard to say the public had no right there, or that it was not a public way. We think the hole left in the sidewalk of appellant uncovered or in any way unprotected was a public nuisance *per se*.

It may be true that the chances for adult persons to get into it in the daytime would be remote, but both adults and children have the right and do use streets at night, and they have the right to presume that neither the public nor private individuals have left pitfalls in them. It is not necessary that a hole in the sidewalk should be large enough for a man to fall in before it can become a nuisance. Children have as much right to be protected in their persons against dangerous walks in a city as adults, and it is no excuse to say that this hole was only large enough to let the little girl fall through. A hole left in a public sidewalk, without covering or protection, where people constantly come and go, large enough to be dangerous to body or limb, is a public nuisance *per se*, without reference to what the purpose was in leaving it thus. Nor is there any hardship or inconvenience in this rule. These

openings under sidewalks are proper and necessary and holes left in the walk are often necessary to their approach, and their protection by grating or other covering is easy and simple without preventing air or light from passing. In addition to the fact that appellant made this hole and must be chargeable with a knowledge of its dangerous character, he was twice warned that some one would be hurt or killed in it. He can not justly complain now that he is called on to pay for damages resulting from his own gross and long continued wilful negligence after he was twice warned of the danger he and others were in.

Lastly, the appellant insists that the court erred in giving the second instruction asked by the plaintiff. That instruction informed the jury that if they found from the evidence that plaintiff was guilty of some negligence, yet if her negligence was slight and the defendant's negligence was gross, when compared with each other, that the plaintiff might still recover. Counsel insist this instruction was like the one given in the C., B. & Q. R. R. Co. v. Johnson, 103 Ill. 512.

We do not think the instructions are alike. The instruction which was held bad in Johnson's case told the jury that, even if they believed Johnson was not exercising ordinary care, that still he might recover, if his negligence was slight, and the defendant's negligence gross when compared with each other. It has been uniformly held in all the cases since Johnson's case, *supra*, was decided, that when the plaintiff did not exercise ordinary care he could not recover, no matter how gross the negligence of the defendant, unless it amounted to a wilful tort. This is the doctrine laid down in the case last above cited, and many cases there referred to. The instruction given in this case did not have that element in it. It stated a correct proposition of law as applying purely to the question of comparative degrees of negligence. The jury had been clearly instructed in other instructions given for both plaintiff and defendant, that the plaintiff could not recover if she had been wanting in reasonable care at the time.

Defendant makes some complaint of the instruction or charge given by the court on its own motion, upon the ground

that some part of it was irrelevant. This observation is correct; but, while some part of it was irrelevant, it stated correct propositions of law and could do the defendant no harm nor mislead the jury.

Defendant's refused instructions are all prepared on the theory that the landlord would not be liable if the premises were in possession of a tenant. They were all properly refused for the reasons heretofore given.

Finding no substantial error in this record the judgment is affirmed.

Judgment affirmed.

NOTE.—This case was first heard and considered while Judges Baker and Welch were on the bench, and the judgment was affirmed and the case assigned to Judge Baker to prepare the opinion; but, before the opinion was prepared, he was elected to the Supreme Bench and Judge Welch had died, and the record was again reviewed after Judges Upton and Smith came upon the bench, and again affirmed. This accounts for the delay in filing the opinion.

GEORGE GROOM

V.

ROBERT PARABLES.

Criminal Conversation—Damages—Evidence—Jurisdiction.

1. In an action to recover damages for criminal conversation with the plaintiff's wife, the marriage may be proved by a copy of the record thereof in a parish register.

2. A general objection to the introduction of a copy of a record does not raise the question of its secondary character, or as to its authentication, but only the question of its competency.

3. In the case presented, it is *held*: That the refusal to allow the wife to testify was proper; and that the verdict for the plaintiff is supported by the evidence.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Carroll County; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. J. M. HUNTER, for appellant.

Messrs. HENRY MACKAY and GEORGE L. HOFFMAN, for appellee.

LACEY, P. J. This was an action on the case commenced by the appellee against the appellant to recover damage for criminal conversation with appellee's wife. There was a trial and verdict and judgment for the latter in the sum of \$711, from which judgment this appeal is taken.

It is complained that the evidence fails to support the verdict; that the proof of marriage was not legally made, and that appellee's instructions were erroneous. We fail to find any force in any of the objections. The fact as to the act of criminal conversation with appellee's wife is well supported by the evidence, and we do not feel at liberty to interfere with the judgment for the reason that there was not sufficient evidence. This we state generally; for it is not necessary to go into a detailed examination of the evidence. The proof of marriage is sufficiently made. A copy of the parish register in London, England, was properly introduced—it is true against the objection of the appellant—but the objection was only general and not special, and only reached to the competency of the evidence. Such general objections do not raise the question as to the secondary character of the evidence, such as being a copy, nor does it raise the question as to its authentication. *Buntain v. Bailey*, 27 Ill. 409. It need not be shown by the proof in the first instance that the marriage was in accordance with the laws of England; such fact will be presumed at least *prima facie*, from the fact alone of the marriage. *Hutchins v. Kimball*, 31 Mich. 126.

Besides the above evidence, appellee testified on the trial to the fact of the marriage; the complaint that the wife of appellee was not allowed to testify has no force. She was not a competent witness at common law, and she had not been made so by statute. *Crese v. Rutledge*, 81 Ill. 266.

Objection is made to appellee's 1st, 2d, 3d, 4th, 6th, 8th and 9th instructions, but a careful examination of them shows us

that they are not objectionable and are in the main correct. The instructions as a whole seem to be fair and full, and neither party has any right to complain of them.

Finding no error in the record the judgment of the court below is affirmed.

Judgment affirmed.

CITY OF PEORIA

V.

SUSAN R. CRAWL.

Municipal Corporations—Diversion of Surface Water—Title to Land Damaged—Evidence.

1. A person having the actual possession of land will be regarded and deemed the true owner thereof until the contrary is made to appear.

2. In a suit to recover damages for an injury occasioned by the wrongful or negligent manner in which work is done on the streets of a city, it is unnecessary to prove that it was done by persons employed by the city, such being the reasonable presumption.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Mr. JOHN M. TENNERY, for appellant.

Mr. ISAAC C. EDWARDS, for appellee.

UPTON, J. This action on the case was commenced by the appellee against the appellant in the Circuit Court of Peoria County, to recover damages caused, as is alleged, by the appellant diverting the surface water of a large territory in appellant city from its natural course, and improperly and negligently conducting the same by means of a sewer constructed and maintained by appellant upon the lot of land of appellee.

and flooding the same, for which, on trial in said court by a jury, appellee obtained a verdict for \$250, upon which verdict judgment was rendered in the court below, and to reverse which the suit was brought to this court by appeal. The main contention here is, that the appellee in the court below did not, by evidence introduced, show an actual paper title in herself to the land claimed to have been damaged by the wrongful act of appellant.

It is insisted on the part of the appellant that such was indispensable to a recovery in the court below or in this court:

1st. Because the appellee in the declaration filed in this case, avers, after description of the "*locus in quo*," that "she held and occupied the same under title in fee simple," etc.

2d. Because the action is brought and seeks to recover damages for a permanent injury to the fee, and not for an injury to a possessory interest merely.

The plaintiff testified that she was in the actual possession and the owner of the lot in question at the time of the injury complained of, and had been for a period of over twenty years (with the exception of a few months when she resided on some other premises nearer the city).

She is sustained in her evidence by some six other witnesses, indeed by all the testimony upon that point in the case on the trial below.

In *Shoup et al. v. Shields et al.*, 116 Ill. 488, which was an action of trespass *quare clausum fregit* to recover damages for entering the close of the plaintiff, and cutting down a hedge growing thereon, it was there, as here, contended, that because the appellees failed to show a fee simple title to the land then in dispute by a regular chain of title from the Government down to plaintiffs, no recovery could be had. The court held in that case, "that it was not necessary to show a chain of title from the Government." "It would have been enough to have shown no more than possession."

In *McLean v. Farden et al.*, 61 Ill. 106, which was an action of trespass *quare clausum fregit* for alleged unlawful entry upon lands and cutting trees thereon, the court held that the person having the actual possession of land, will be regarded

and deemed the true owner thereof until the contrary is made to appear; and that whoever would dispute that possessory title, can only do so by exhibiting paramount title.

In the case of *The City of Chicago v. McGraw*, 75 Ill. 566, which was an action of trespass *quare clausum* for injuries done to land by excavating the Illinois and Michigan Canal, which manifestly was a permanent injury to the land, the court held that, in trespass to real estate in the actual possession of the plaintiffs, when no effort is made by the defense to show title in any one else, proof of title other than of possession is not necessary.

We conclude, therefore, that the points above stated of appellant are not well taken, and that the court below did not err in that regard.

A further point is made by appellant, which is that it is not sufficiently shown by this record that the appellant did or caused the work done, or culvert built, which caused the injury, which, as is contended, could have been done in this case by the records or ordinances of appellant city.

The appellant's city engineer, Geo. F. Weigretman, testified that he was the city engineer of the city of Peoria, and had been such for six years prior to that time; that he, as such engineer, had charge of the work when the culvert complained of was put in, and that it was done under his supervision. The work was nearly finished in the fall of 1884, but some was done in the spring of 1885.

It is a reasonable presumption, where work is done on the streets of a city, that it is done by the proper authorities of the city, and in a suit to recover damages for an injury occasioned by the wrongful or negligent manner of doing such work it is not necessary to prove that it was done by persons employed by the city. *The City of Chicago v. Brophy*, 79 Ill. 277; *The City of Chicago v. Johnson*, 53 Ill. 94, and cases cited.

We have carefully examined the record in this case and we think the jury were warranted in the verdict rendered in the case, and that the court was fully justified in the instructions given, and finding no error therein the judgment is affirmed.

Judgment affirmed.

McDonald v. The Village of Lockport.

JONATHAN S. McDONALD

V.

THE PRESIDENT AND TRUSTEES OF THE VILLAGE OF
LOCKPORT.

28	157
1988	285

Municipal Corporations—Defective Sidewalk—Personal Injury—Recovery from Village—Action over against Abutting Property Owner—Former Adjudication—Evidence—Powers of Village Trustees.

1. Where a municipal corporation which has been required to pay damages for a personal injury caused by a defective sidewalk, the owner of the abutting property having joined in the defense, brings suit to recover the amount so paid from such owner, he can not again litigate questions involved in the first suit.

2. In the case presented, it was only necessary for the plaintiff to prove that the negligence of the defendant was the cause of the injury, and that judgment against it had been obtained and paid.

3. A village board of trustees can only bind the village when acting in their corporate capacity, and such act must be of record. Instruction or directions to a police constable by individual members of the board acting separately do not bind the municipality.

4. In the case presented, the court properly directed a verdict for the appellee, it having made by its evidence a *prima facie* case, and the defendant having failed to make any defense.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding.

Mr. C. W. BROWN, for appellant.

Messrs. HILL & HAVEN, for appellant:

C. B. SMITH, J. In 1885 appellant owned and occupied a building on the north side of Tenth street, in the village of Lockport. Desiring a better sidewalk in front of his building he tore away the old one and excavated the earth under the same about eight feet deep, and laid a new stone sidewalk in

the place of the old one, about eleven feet wide, and thirty feet long. Some time after this new sidewalk was laid by appellant, and being used by the public, one Randall Lynn, on the 4th of March, 1886, fell into a hole in said sidewalk and was injured. For this injury Lynn sued the village of Lockport. A trial of this suit was had resulting in a judgment in favor of Lynn for \$200 and costs taxed at \$63.05.

Lynn's declaration contained two counts. The substance of the first being that the sidewalk in question had, for a long time prior to the injury complained of, been out of repair and a large opening in the sidewalk left open and unguarded and that he, while exercising due care in passing over said walk in the night time, fell into such hole and was injured. The second count charges that a large stone forming a part of the sidewalk had been removed out of its place and thereby left a hole in the sidewalk, into which he fell while exercising due caution. Both counts allege negligence on the part of the city. The defendant pleaded the general issue. Appellant here was served with notice that the village had been sued and requested to appear and defend. He appeared by his attorney and assisted in the defense. The village was defeated and paid the full amount of judgment, costs and interest.

This suit is now brought against McDonald, the appellant, by the village of Lockport to recover over against him the amount of the former judgment against the village. The declaration alleges the negligent manner of building the sidewalk by McDonald and its dangerous character, the injury to Lynn and his recovery of a judgment against the village, and its payment. The defendant pleads the general issue.

On the trial the village proved its corporate existence, the ownership of the property along which the sidewalk was built, that appellant built it, that it was dangerous, and that Lynn fell into it in the night time and sustained injuries for which he recovered. The notice to appellant to appear and defend, and the fact that he did appear and assist in the defense, was admitted. It was also admitted that the village had paid the full amount of judgment, interest and costs,

McDonald v. The Village of Lockport.

amounting in all to the sum of \$267.65. The record of the suit of Lynn against the village was also introduced. The proof fully established the identity of the two causes of action. Thereupon the appellee rested its case.

To meet this case, so made, the appellant introduced one Sly, the marshal of police, a constable of the village. Appellant asked witness "if he had any instructions or directions from the village trustees in reference to that opening?" to which appellee objected, and the objection was sustained and exception taken. Witness testified that he told McDonald to fix the place, and that McDonald asked him if that would do? Appellee objected to witness giving any further conversation between himself and McDonald, which objection was sustained and exception taken.

This witness was also asked if he acted with a knowledge of the trustees in looking after the sidewalks, and if he acted in his official capacity in doing what he did, to which objection was made and sustained and exception taken. We think the court ruled correctly in excluding this testimony. Any authority to bind the village must have been a matter of record. The individual officers of the board, acting separately, could not bind the village by any instructions or directions any of them might give the officers. They can only bind the village when acting in their corporate capacity, and those acts must be shown by the record.

Appellant also called Randall Lynn, who testified that McDonald's building, where he was hurt, was just opposite the city hall. He was then asked to state if the lamp on the street in front of the city hall was lighted and burning that night, to which objection was made and sustained, and exception taken. Appellant then offered to prove by the witness and the corporate records that the village had for years undertaken to light the streets, including the street in controversy, and that Lynn was hurt on a dark night; that the lamp in front of the city hall was not lighted on that night; that, if it had been lighted, the holes in the sidewalk could have been seen by Lynn and avoided; that the failure to light the lamp contributed to Lynn's injury, and that the police constable had

been charged by the records with the duty of lighting the lamps, including the one in front of the city hall, but the court refused the offer and exception was taken. We think the court was correct in this ruling. This evidence would have been competent in the suit of Lynn against the city. But appellant having been notified to appear and defend that suit, was bound by the judgment there had and can not now litigate the questions then involved, in this suit. All that appellee was bound to prove in this case, was that appellant was the author of the mischief for which the village had been convicted and that it had paid the judgment. Upon this evidence the right of appellee to recover was absolute. *Gridley v. The City of Bloomington*, 68 Ill. 47; *Todd v. The City of Chicago*, 18 Ill. App. 505; *City of Bloomington v. Roush*, 13 Ill. App. 341. The appellant offering no further evidence, the court thereupon directed the jury to return a verdict for the appellee for the sum of \$267.65, which the jury did, and the appellant had judgment on the verdict.

The appellee, by its evidence, made a *prima facie* case, and the appellant having failed to offer anything against it, there was no error in the court directing a verdict for the appellee. There was nothing for the jury to try, and to have sent them out to consider of their verdict would have been but an idle ceremony.

We find no error in the record.

Judgment affirmed.

JOHN LYNCH

V.

D. B. JACKSON ET AL.

Mortgages—Deed Absolute in Form—Separate Defeasance—Forfeiture—Bill to Redeem—Limitations—Laches—Notice to Devisee.

1. A conveyance of lands, absolute in form, made by a debtor to a creditor who, by separate instruments executed at the same time, agrees to re-convey upon payment of the indebtedness, is a mortgage.

Lynch v. Jackson.

2. In the case presented, upon a bill to redeem, it is *held*: That the deed and contract in question are to be construed as a mortgage; that the mortgagee and his devisee, the defendant, having failed to declare a forfeiture and foreclose the mortgage after the expiration of the two years limited in the contract, the mortgagor is entitled to redeem and to an accounting for rents and profits, although his bill was not filed until a little over five years after the note became due; and that the defendant is chargeable with at least constructive notice of the rights of the complainant.

3. In this State it seems that the right of redemption against a mortgagee in possession extends during the statutory period for foreclosure.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

Messrs. R. C. MONTONY and A. C. LITTLE, for appellant.

Messrs. CHAS. WHEATON and M. O. SOUTHWORTH, for appellees.

C. B. SMITH, J. This was a bill brought by John Lynch, appellant, against D. B. Jackson and others, appellees, to redeem from a mortgage certain premises described, and for an accounting as to rents and profits.

The facts as disclosed by the record are these: Prior to the 21st day of August, 1877, John Lynch and S. L. Jackson, the father of D. B. Jackson, had business transactions resulting in Lynch becoming indebted to Jackson upon different promissory notes, some of them secured upon the property now in controversy. These notes had become past due, and were doubled up on one or two occasions and renewed, and constantly growing, and no part of principal or interest being paid until, on August 21, 1877, they reached the sum of \$1,850, principal and interest. Samuel L. Jackson then notified Lynch that he would wait no longer for his money, and that it must be at once paid or he would throw him out of the property covered by the mortgage in thirty days; Jackson proposed to Lynch to deed him the property in satis-

faction of the debt; Lynch declined to do it, begging further time, which Jackson positively refused to give.

Lynch and Jackson spent the whole of the 21st day of August trying to adjust the matter.

They finally came together and it was agreed that Lynch and his wife would execute an absolute deed for the premises to Jackson, and that Jackson would obligate himself to re-sell the property to Lynch at the expiration of two years, on condition of Lynch paying up the \$1,850, with interest. This contract thus executed was as follows :

“Articles of agreement made this twenty-first day of August, in the year of our Lord one thousand eight hundred and seventy-seven, between Samuel L. Jackson of the city of Aurora, Kane County, Illinois, party of the first part, and John Lynch of the same city, county and State aforesaid, party of the second part. Witnesseth, that the said party of the first part hereby covenants and agrees that, if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the first part will convey and assure to the party of the second part, in fee simple, clear of all incumbrances whatever hereafter accruing, by a good and sufficient warranty deed, the following lot, piece or parcel of land, viz.: Situated in the city of Aurora, Kane County and State of Illinois, and described as follows: Commencing at a point twenty-two feet northerly from the southeasterly corner of lot No. 6, in block 5, of the original plat of West Aurora, as recorded, and running westerly sixty feet at right angles with River street; thence northerly along the east line of lands heretofore belonging to W. V. Plum, twenty-one feet; thence easterly to River street; thence southerly twenty-one feet to the place of beginning: And being all and the same this day deeded from the said John Lynch and his wife to me, the said Samuel L. Jackson, and being the store and lands on said River street. And the said party of the second part hereby covenants and agrees to pay to said party of the first part the sum of one thousand eight hundred and fifty-two dollars (\$1,852) two years from the date of these presents, with annual interest at ten per cent. per annum, according to the tenor of one cer-

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tain promissory note executed by said John Lynch, and payable to the said party of the first part two years after date thereof, with annual interest at ten per cent. per annum, dated the twenty-first day of August, 1877, and for the same sum above mentioned, to wit, the sum of \$1,852. And in case of the failure of the said party of the second part to make said payments of interest or principal, or perform any of the covenants on his part hereby made and entered into, this contract shall, at the option of said party of the first part, be forfeited and determined, and the party of the second part shall forfeit all the payments by him made on this contract, and such payments may be retained by the party of the first part in satisfaction and liquidation of all damages by him sustained. And it is further mutually covenanted and agreed by and between the said parties that said party of the first part shall take, keep and retain the possession, occupancy and control of said lands and premises during the continuance of this contract, with a right to rent or lease the same. And it is further mutually agreed that the said party of the first part shall pay all taxes due, past due and to become due on said premises, and also make all necessary repairs on said lands and premises, and shall, from the rents received from the same, pay and liquidate such repairs and taxes, and apply any surplus upon the note above described, and for any surplus of expenses for repairs and taxes over the rent that may be received the party of the second part shall be liable to the party of the first part as a further indebtedness under this contract, to be paid, with ten per cent. interest thereon, at the expiration of the time expressed for the payment of the principal of said note.

“ And it is also mutually agreed that the party of the first part may get the premises insured for his own benefit, to the amount not to exceed \$1,500, during said two years, and the costs and expenses of which shall be a further indebtedness under and subject to the terms of this contract. It is mutually agreed that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

“S. L. JACKSON, [L. s.]

“JOHN LYNCH, [L. s.]”

This contract and the deed and notes were all signed and delivered at the same time, all being one transaction. It is manifest that the contract was a mere defeasance to the deed, and that the deed, though absolute in form, was intended only as a security for the debt, and was but a mortgage. The terms of the contract are so clear and conclusive upon that point that no discussion could make it plainer. The law upon this subject is so well settled that the citation of authorities in its support seems but a useless ceremony, and we shall content ourselves with the citation of a single case—*Snider v. Griswold*, 37 Ill. 216.

Indeed, we do not understand appellees as making any serious contention that this was not a mortgage. They rest their defense upon the ground of *laches* and estoppel. S. L. Jackson took possession, made repairs, paid the taxes and received the rents. At the end of the two years Lynch failed to pay the note. Neither he nor S. L. Jackson gave the matter any attention; Jackson remained in possession until his death, which occurred about one year after the note became due. About a month before his death he made a will, dividing his property among his children, and gave this property in dispute to his son, D. B. Jackson, who immediately went into possession and remained in possession, treating the property in all respects as his own until this suit was brought.

Appellant Lynch filed this agreement of defeasance for record immediately after it was made and delivered to him. Taking the property as a gift, and chargeable also with notice of what the recorded contract contained, D. B. Jackson holds the property precisely as his father held it, and can claim no exemptions or rights in relation to the property which his father could not have claimed. This contract notified him that he was holding and improving the property and collecting rents as a mortgagee whose duty it was to apply all above repairs and taxes on appellant's note. He went into possession under this mortgage and remained in possession with full legal knowledge of the obligation to apply all in excess of taxes, interest and repairs on this note. He can not claim that he was innocently and ignorantly making these improvements

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and that appellant was standing by and permitting him to improve his property without informing him of his rights. Appellant contracted in this defeasance that his note might be paid by the rents unless Jackson elected to declare a forfeiture on failure to pay the note. There is no proof that such a forfeiture was ever declared. It is a maxim of the law that "once a mortgage always a mortgage," until it is satisfied. *Miller v. Thomas*, 14 Ill. 428.

If this property had once passed into the hands of a stranger for a valuable consideration without actual or constructive notice of this defeasance, then very different questions would arise. But here the constructive notice to appellee of the rights of appellant is clear, and the strong probabilities are that he had actual notice of the nature of the transaction between his father and appellant. But constructive notice is as effectual to protect appellant's right as actual notice. Appellee's position, then, as well as that of his father before him, was simply that of a mortgagee in possession, nothing more or nothing less; the father with actual contract knowledge of that fact, and the son, being but a volunteer, took it chargeable with its burdens in his father's hands, with the added constructive knowledge the record gave him; that the only right he had in the property was that of a mortgagee, and that under the defeasance he might declare a forfeiture and foreclose the mortgage, or he might waive the forfeiture and continue in possession, under the terms of the defeasance, until the note with its accruing interest was paid with the surplus rents over taxes and repairs, and then surrender back the premises to appellant. This, in our judgment, was the clear legal effect of that defeasance. Finding, as we do, that this was a mortgage, the only remaining question for us to determine is, has anything intervened to prevent appellant having the right to redeem? The appellee urges that he has lost this right by his delay in bringing his bill and by estoppel.

In this State no definite rule was ever laid down as a limitation of time upon the right of mortgagors to redeem from mortgagees in possession until the case of *Locke v. Caldwell*, 91 Ill. 417, which came before the Supreme Court in 1879. Prior to

that time the cases involving that question seemed to be determined, not so much upon any statute of limitations as upon the circumstances and equities surrounding each particular case. In the case above referred to, the court holds that the law of limitations is that the right of a mortgagee to foreclose and that of a mortgagor to redeem are mutual. The question there arose as to the right of a mortgagor to redeem a certain town lot, and also certain other lands, upon a bill filed for that purpose. The court use this language:

"It is the well settled general rule that twenty years' possession by the mortgagee, without account or the acknowledgment of any subsisting mortgage, is a bar to the equity of redemption, unless the mortgagor can bring himself within the provisions of the statute of limitations. *Demarest v. Wynkeep*, 3 Johns. Ch. 129. In *Harris v. Mills*, 28 Ill. 44, this court has held that when the note secured by the mortgage was barred after sixteen years, the mortgage would also be barred.

"The general rule which has been stated, as to twenty years possession by the mortgagee barring the equity of redemption, is reciprocal, and the mortgagee will be equally barred by the lapse of time."

In this case the court quotes with approval the language of Chancellor Kent in *Moore v. Cable*, 1 Johns. Ch. 386, where he declares the rule to be, that twenty years actual possession by the mortgagee is necessary to bar the equity of redemption in the mortgagor. And the same doctrine was held in *Bollinger v. Choteau*, 20 Mo. 89. There a bill to redeem, was filed thirty-six years after the mortgage was made, and sixteen years had elapsed after the mortgagee had taken possession.

"In general, the respective rights of the mortgagee and mortgagor, with regard to foreclosure on the one hand and redemption on the other, are treated as mutual; that is, the existence of the former is held to involve that of the latter, and *vice versa*, and the fact that the one can not be legally enforced under the circumstances, is regarded as sufficient to preclude a claim for the other. It is said the right to redeem and foreclose are reciprocal and commensurable. 2 Hilliard on Mort., Sec. 2."

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And in this same case the court refused to apply the doctrine of staleness and *laches* which was there urged, as it is urged here, under the rule laid down in 2 Story's Eq. Jur., Sec. 1520, as being a defense peculiar to courts of equity and founded upon mere lapse of time and the staleness of the claim in cases where no statute of limitations directly governs the case.

We understand the above case of Locke v. Caldwell, from which we have quoted, as holding that the right of redemption is not barred by a less time than the right of foreclosure, which, under the statute in force when the note in question here was made, would be ten years. This bill was filed in a little over five years after the note was due.

Counsel for appellee cite us to a great number of cases where equitable relief has been denied on the ground of *laches*, and to many cases where the right to redeem has been refused for the same reason. It is said that Bush v. Sherman, 80 Ill. 160, is an authority against appellant. In that case the mortgagor executed a trust deed with a power of sale, and then voluntarily went into the great rebellion and joined himself to the enemies of his country, and while absent the premises were sold under the power; when he returned after the war, he filed a bill to set aside the sale, alleging that the power was not executed in strict conformity with the deed of trust. There was no question of the right of redemption involved. The court held that his delay was inexcusable for the purpose of setting aside a sale for mere irregularity.

In Cleaver v. Green, 107 Ill. 68, it was held that five years lapse of time would bar a right to set aside a sale made under a trust deed with a power of sale for mere irregularities in the sale. No question of the right of redemption was made, further than that such right would result from setting aside the sale.

In Beach v. Byers, 93 Ill. 295, the bill was to declare a trust and enforce specific performance, and complainant's *laches* was held a bar.

In Williams v. Rhodes, 81 Ill. 571, the bill was to set aside an execution sale after the lapse of five years, and the relief was denied on account of the lapse of time.

In *Maher v. Farwell*, 97 Ill. 56, the bill was filed as in the case at bar to redeem from an alleged mortgage in the shape of a deed absolute on its face. The bill set up a parol agreement, made about the time of the conveyance, between Maher and Farwell, to the effect that a deed absolute should be made to Farwell, and that upon the payment of a note of \$1,700 which Farwell held against Maher, the land should be conveyed back to Maher; the bill to redeem was filed some thirteen years after the date of the deed and the alleged parol agreement, and the relief was denied. The court in that case seems to place the chief ground for refusing the relief prayed for on the failure of Maher to prove his bill by clear and satisfactory evidence after so great a lapse of time. It is true the court say that Maher had shown no sufficient reason for the long and extraordinary delay in bringing his suit, and until the facts connected with the transaction had faded from the memory of the witnesses, or the witnesses died or left the country.

So far as can be gathered from this case, the attention of the court had not been called to its previous deliberate judgment in *Locke v. Caldwell*, 91 Ill. 417. The remark as to the lapse of thirteen years seems to be incidental to the main point of the decision, holding that the parol defeasance was not sufficiently proven, and that it was dangerous to place much weight on the memory of witnesses after the lapse of so many years. These observations of the court could have no application where the defeasance was in writing and under seal, and where there could be no question about the fact of the defeasance being made as in the case before us. That and this case, in that important respect, are wholly different. But, aside from the grounds upon which we have so far considered the case and found that appellee has the right to redeem, we are not disposed to hold that appellant would not have the right to redeem from the mere lapse of time. It is evident from the record that his financial condition made it difficult, if not impossible, for him to raise so large a sum of money, and that for him to have made application to redeem without the money to do so would have been an idle ceremony. He

McConaughy v. Mahannah.

might well rest on the presumption that his debt was being paid by the rents, and that it was much better for him to let it remain in that condition until the debt was paid, than for him to repossess himself of it, and again begin the struggle to pay the debt himself, which he had so signally failed to do before he executed the mortgage and let the mortgagee into possession. We think the delay was not so great nor unreasonable under the circumstances as to justify a court of equity in now withholding the right to redeem on the mere ground of *laches*, even if there were no better ground upon which to place the right to redeem.

For the reasons above given we think the court erred in dismissing complainant's bill. The decree will be reversed and the cause remanded, with directions to the court to set aside the order dismissing the bill and to grant a decree allowing complainant to redeem, and to refer the case to the master to state an account of the amount due on the note, and also of the rents and profits received by the appellees, together with taxes and insurance paid, and the reasonable and necessary repairs made, and at the end of each year to credit the note, with the surplus, if any, of rents over taxes, insurance and necessary repairs, etc., and for each succeeding year. If there is any balance found due complainant, he will be entitled to a decree for that amount, and if there be any balance found due appellant, he will be entitled to a decree against the party having had possession of the property for such balance.

Reversed and remanded.

JAMES O. McCONAUGHY

V.

CORDELIA A. MAHANNAH.

28	169
45	484
28	169
51	402
28	169
71	854

Real Estate—Broker—Sale by Owner—Broker's Commission—When Earned—When Due—Measure of Compensation.

1. Where land, in the hands of a broker for sale, is sold by the owner, such

broker or agent is entitled to his commission, if the sale was brought about through his efforts.

2. Such commission is due when a purchaser is found who buys the property, and the right thereto is not affected by any modification of the terms of payment, or modes of security, or ultimate compliance with the conditions of such sale made between the buyer and seller, different from the terms first given by the seller to the broker.

3. In such a case the compensation stipulated in the contract fixes the measure of compensation, without regard to whether it is adequate.

[Opinion filed December 8, 1888.]

IN ERROR to the County Court of Ogle County; the Hon. GEORGE P. JACOBS, Judge, presiding.

Mr. D. W. BAXTER, for plaintiff in error.

Mr. J. C. SEYSTER, for defendant in error.

There is a marked distinction between a sale and a contract to sell, a purchase and a contract to purchase. In the one case the title passes, in the other it does not. *Jennings v. Gage et al.*, 13 Ill. 613; *Schneider v. Westerman*, 25 Ill. 424.

No cause of action had, or could have accrued to the plaintiff at the time of the commencement of this suit, as White had not purchased, and it could not be known then whether or not he would ultimately purchase, and no commissions would in any event be due plaintiff and no cause of action accrue to him until March, 1886.

A broker employed to sell real estate must produce a person who ultimately becomes purchaser before he is entitled to his commissions. *Richards v. Jackson*, 31 Md. 250; *Stewart v. Murray*, 92 Ind. 543; *Walker v. Tirrell*, 101 Mass. 257; *Tombs v. Alexander*, 101 Mass. 255.

Where a person introduced by a broker enters into an agreement to purchase, but he afterward fails to consummate it, the broker will not be entitled to his commission. *Kimberly v. Henderson*, 29 Md. 512.

Where a broker procures an offer to be made and advises against it, and subsequently his employer negotiates a sale at an advanced price to the same person, the broker is not en-

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titled to his commissions on the sale. *White v. Twitchings*, 26 Hun, 503.

Where the broker opens negotiations but fails to bring the customer to terms, and the employer subsequently sells to the same person at the price fixed, he is not liable to the broker for his commissions. *Wylie v. Mar. Nat. Bank*, 61 N. Y. 415; *Chandler v. Sultan*, 5 Daly, 112; *Bennett v. Kidder*, 5 Daly, 512; *Dennis v. Charlick*, 6 Hun, 21; *Schwartz v. Yearly*, 31 Md. 270; *Vreeland v. Vetterlein*, 33 N. J. Law, 247; *Lane v. Albright*, 49 Ind. 275.

There is no pretense here by the plaintiff that he did, or was able to sell this land for \$35 per acre. If he could recover in this case on any theory it must be on an implied contract to pay him a reasonable compensation for the services actually performed by him, and as there is no proof of the value of such services the court could not give him judgment.

Where the plaintiff has rendered services under special contract but not in the stipulated manner, but in a manner beneficial and acceptable to defendant, plaintiff can not recover on the contract, but may upon a *quantum meruit*. 2 Greenleaf on Evidence, Sec. 104; Addison on Contracts, 409; *Bannister v. Read*, 1 Gil. 92; *Webster v. Entfield*, 5 Gil. 298; *Eggleston v. Buck*, 24 Ill. 262; *Taylor v. Renn et al.*, 79 Ill. 181; *Schiller et al. v. McEwen*, 90 Ill. 77.

UPTON, J. The plaintiff in error was a real estate broker residing at Rochelle, in Ogle County. The defendant in error, residing in the same county, was possessed of a farm of about 241 acres, and desirous of selling the same. In the month of July, 1885, she called upon plaintiff in error at his office and had an interview with him about selling her farm.

At this interview it was agreed between the parties that plaintiff in error should advertise the farm for sale in each of the two newspapers then published in the said town of Rochelle, he to pay for the advertisement in one newspaper, she in the other. He was to have two per cent. commission on the sale, and was authorized to sell the farm at \$35 per acre. He drew up the notices for sale thereof, of which she

approved, and in which was stated the price per acre, and it was published in the two papers as mentioned. A few days after such publication Cary J. White called on plaintiff in error as agent of defendant in error, stating that he had seen the advertisement for the sale of the farm in the newspaper, and made an offer to purchase the same at \$30 per acre.

Plaintiff in error immediately went to defendant in error in person, informed her of the offer he had received from White, upon which she immediately went to plaintiff's office and held a personal interview with White in the presence of plaintiff, speaking favorably of the offer made to White, but called plaintiff in error into his office, and directed him to go out and find one Peter Smith and make him an offer of the farm at the same price of \$30 dollars per acre, but to try and get better terms of payment and more money down, than proposed by White. Plaintiff went as instructed, saw Smith, who desired to see his son-in-law and talk with him regarding the matter, of which he informed defendant in error, and she thereupon suspended further negotiations concerning the sale, for that day, with White.

In about two weeks after this interview, White went in person to the defendant in error and completed the purchase of the farm, agreeing to pay \$32 per acre therefor; the farm being in possession of a tenant of defendant in error, with right to remain until March 1, 1886, allowing incoming tenant or purchaser to do fall plowing and ditching thereon. The purchaser, White, gave a secured note for a part of the purchase money, due March 1, 1886, went upon the farm, plowed about forty acres of land, and dug about 160 rods of ditch, in the fall of 1885, after he had purchased it. The abstract of the title not being, at the time of making the purchase, written up or completed, a contract evidencing the sale was drawn up and signed by the parties (vendor and vendee).

The sale of the farm to White being made as stated, the commissions under the contract as claimed by the plaintiff in error were \$154.50. In October, 1885, defendant refusing to pay, suit was commenced by plaintiff in error against defendant in error, to recover said amount as commission, before a

justice of the peace in Ogle County, and he obtained a judgment for the sum of \$153.60 and costs, from which judgment an appeal was taken to the County Court of Ogle County, a trial had therein, and a judgment rendered for the defendant in error for her costs, to reverse which the suit is in this court on writ of error, and the contention here is whether, under the facts on this record, the plaintiff in error is entitled to recover his commissions stipulated in said contract?

The general rules of law applicable to this class of cases as we understand it, briefly is: That if the land, while in the hands of the broker or agent for sale, is sold by the principal, still, if the purchaser is procured or obtained by the efforts of the agent or broker, such agent is entitled to his commission. *Lawrence v. Atwood*, 1 Ill. App. 222, and cases there cited; *Caster v. Webster*, 79 Ill. 435.

The commissions of a broker for the sale of real estate are due when he has found a purchaser who buys the property, and his right to such commissions is not affected by any modification of the terms of payment or modes of security, or ultimate compliance with the conditions of such sale made between the buyer and seller, different from the terms first given by the seller to the broker. *Lawrence v. Atwood*, 1 Ill. App., *supra*; *Glentworth v. Luther*, 21 Barb. 145, in which last cited case the court says:

“There can be no doubt as to the extent of the duties to be performed by one who, as broker, is employed to sell real estate. In the nature of things he can do nothing more than find a party who will be acceptable to the owner and *enter into a contract of purchase with him*, unless the owner makes him more than a broker merely, by giving him power of attorney to convey the property, and then the employe would cease to be the broker and become the attorney.

“The law fixes the time as of the date when the broker produces to his principal a party with whom the owner is satisfied, and who *contracts* for the purchase at a *price acceptable to the owner*.

“That the commission (agreed) *is due* to the broker *at that time*, is manifest from the fact that when this is done the

broker has exhausted his power to act. And having thus done all that is possible for him to do, he certainly has done all that he can be held to have contracted to do; the plaintiff had therefore earned his commissions as soon as the purchaser signed the contract." See also *Kock v. Emmerling*, 22 How. 69.

The same principle is announced in *Hoyt v. Shepherd*, 70 Ill. 309. In that case the agent sold the premises for less than he was authorized to sell for, and upon different terms, and it was held that he was not entitled to his commissions in *the absence of proof of a ratification* of the sale by the principal.

The amount of compensation which the plaintiff in error was entitled to receive, if any, was the amount stipulated in the contract—two per cent. on the amount of the sale; the law being, that where work is done under a special contract fixing the price, that must constitute the measure of compensation. Whether the price specially agreed upon was greater or less than the real value of the work done makes no difference; the contract alone controls whenever it can be made to apply. *Brigham v. Hawley*, 17 Ill. 38.

In the view we take of the case at bar, and for the reasons assigned, we think the plaintiff in error was entitled to recover the full amount of the two per cent. on the price for which the farm of the defendant in error was sold, and that his commissions were due when the contract of purchase and sale was executed by the said White and defendant in error, and that the County Court erred in not so holding, and for that reason the judgment of the said County Court is reversed and this cause is remanded.

Reversed and remanded.

IDA WITZMANN

V.

PAULINA KOERBER.

Parent and Child—Illegitimate Child—Board of—Express Promise to Pay—Adoption—Instruction—Evidence.

Witzmann v. Koerber.

One who supports and cares for the child of another, treating it as his own, without really adopting it, can not recover for its board, in the absence of an express promise to pay therefor. Liability in such a case will not attach until the child has been tendered, or notice given that it will no longer be boarded free of charge.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Du Page County; the Hon. C. W. UPTON, Judge, presiding.

Messrs. E. H. & N. E. GARY, for appe'lant.

It was not necessary that the plaintiff should prove "an express promise" to pay, in order to be entitled to recover. In the first place the rule is different as applied to parent and child and aunt and nephew. Relationship tends to rebut the legal presumption of a promise to pay, but of itself it is held not to overcome this presumption, except as between parent and child. *Gallagher v. Vought*, 8 Hun, 87; *Neal v. Gilmore*, 79 Pa. St. 421; *Erbern v. Lorillard*, 19 N. Y. 302; *Scully v. Scully*, 28 Iowa, 548; *Ayres v. Hull*, 5 Kan. 419.

Slight evidence will overcome the presumption that there is to be no compensation. *Neel v. Neel*, 59 Pa. St. 347; *Hays v. McConnell*, 42 Ind. 288; *Freermuth v. Freermuth*, 46 Cal. 42.

Mr. WILLIAM NUNN, for appellee.

LACEY, P. J. This was a suit in assumpsit brought by the appellant against the appellee to recover for seven or eight years' board of the illegitimate child of the latter, who was the sister of the appellant.

The right to recover was based on an alleged agreement between the parties that the appellant was to be paid at the rate of two dollars per week for the board.

The appellant supported her claim of an express promise by her own testimony, somewhat corroborated by her sister, Leah Potter. The appellee denied that any promise was made to pay for its board, but on the contrary the appellant

took the boy as her own and had him christened as her own child, and never demanded or expected pay for his keeping till 1886. The child was taken in 1877. This testimony was strongly corroborated by the husband of appellee and his brother, and Magdalena and Bettie Newberger. It abundantly appears that the appellant took the child as her own and adopted it—in fact, that she stood *in loco parentis*, without any express promise on the part of appellee to pay for the board of the child. The jury would not have been justified in finding anything else by their verdict.

The appellant based her entire right to recover upon an express promise, and states in her brief that “plaintiff abandoned all claim for clothing,” because “there was no evidence tending to show a promise to pay for clothing.” Under the circumstances there was no error committed by the court in submitting the question to the jury for special finding: “Was there any express contract between the parties for defendant to pay for the board and clothing in question?” There were no circumstances surrounding the transactions of the parties from which an implied promise could be inferred. This was so well understood that appellant withdrew her claim for the child’s clothing from before the jury. She relied wholly on an express promise, as we think the evidence clearly shows she was compelled to, and as to the issue on the question of an express promise we are satisfied with the general and special verdict of the jury.

The court committed no error in instructing, under the evidence and circumstances of the case, that an express promise to pay was necessary.

It is insisted by the attorney for appellant that, at all events, the appellant had the right to recover for the board of the boy from July 9, 1886, the day she wrote a letter to appellee by her husband, saying, “Willie is ready to go to Lombard as soon as possible.” We do not so understand the law. In this letter there was no notification that the appellant would no longer keep the child in the same relation as before, but only that she, or the boy, was willing that appellee might have him, as the latter had, on the 5th July, requested him and was refused.

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Appellant should, if she was desirous of terminating her former relation, have either tendered the child or given notice that she would no longer board him free of charge. *Chilcott v. Trimble*, 13 Barb. 502.

Perceiving no error in the record the judgment is affirmed.

Judgment affirmed.

Judge UPTON, having tried the case below, took no part in the decision here.

WILLIAM G. SARGEANT
V.
JACKSON MARSHALL.

Replevin—Sale of Team—Possession under Contract of Sale—Innocent Purchaser without Notice—Instructions—Estoppel.

1. An innocent purchaser of property from a vendee in possession under a contract of sale with an unpaid vendor, without notice, acquires title.

2. The owner of personal property wrongfully taken from his possession is not bound to pursue it diligently and recapture it, under penalty, in case of neglect, of losing title, if sold to a third party.

3. The vendee is bound to know the title to personal property when he purchases, and the owner is not estopped, unless he stands by and sees a person about to purchase and makes no claim.

4. An instruction which ignores the main issue in the case, and is misleading in a serious degree, is not helped by a direction that it should be considered in connection with the other instructions in the case. The instructions should be harmonious and not contradictory.

5. An instruction which is argumentative and has no sufficient basis in the evidence, is erroneous.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. J. A. MCKENZIE, for appellant.

Instructions calling attention to a part only of the evidence

are bad; and especially so when, as here, it ignores all there is in plaintiff's case—all evidence and claim that Moore turned the horses over to William G. Sargeant, and transferred his, Moore's, title to him—ignores, in fact, the entire transaction which created plaintiff's right. Ill. Linen Co. v. Hough, 91 Ill. 63; C., B. & Q. R. R. Co. v. Sykes, 96 Ill. 162; Logg v. People, 92 Ill. 598; Coon v. People, 98 Ill. 368; Chambers v. People, 105 Ill. 409; Evans v. George, 80 Ill. 51.

An instruction which ignores the important and turning point in a case is erroneous. Sinclair v. Berndt, 87 Ill. 174; C., B. & Q. R. R. v. Griffin, 68 Ill. 499.

Instructions must not ignore the main ground of recovery. Thorne v. MacVeagh, 75 Ill. 81; Am. Ins. Co. v. Crawford, 89 Ill. 62.

When instructions are opposite, it is error. It leaves the jury to select which ones to follow. W., St. L. & P. Ry. v. Schacklet, 105 Ill. 364; Ill. Linen Co. v. Hough, 91 Ill. 63; Cummings v. Leighton, 9 Ill. App. 186; Knowlton v. Fritz, 5 Ill. App. 217; Steinmeyer v. People, 95 Ill. 483; Stratten v. Cent. City H. Ry., 95 Ill. 25.

Messrs. J. J. TENNICLIFF and G. W. PRINCE, for appellee.

LACEY, P. J. This was an action in replevin brought by appellant against appellee to recover the possession of two horses described in the writ. The pleas were *non cepit*, *non detinet* and property in defendant.

The evidence in the case shows that one Jared Moore purchased the team in question of either James Sargeant, the brother of appellant, or the appellant himself—for the purposes of the trial it is immaterial which—in August, 1886, for \$205, and paid \$30 of it, and was to give a note to appellant for balance, without interest, due in one year. It seems that if appellant was not the absolute owner or vendor of the team he was the creditor of his brother James, and the purchase price of the team was to be paid to him, and he was to receive a mortgage on it to secure the amount due from Moore.

Moore took possession of the team but never gave the

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security as required, and in March, 1887, sold it to the appellee for \$125 and delivered it to him, who was not aware but that Moore was the absolute owner of the team. If this were all there was of the case, the appellee would undoubtedly be protected in his purchase, as between him and James Sargeant or between him and appellant. For, in case one holds property in possession under a contract of sale with an unpaid vendor and sells to an innocent purchaser without notice of the condition, such purchaser acquires title to the property. *Young v. Bradley*, 68 Ill. 553.

But the claim of the appellant rests upon another important fact, or facts, as he insists and as the evidence tends strongly to show. It tends to show that some time about the 19th to 22d day of February, 1887, Jared Moore brought back the team to appellant's premises and delivered it up to him in payment of the purchase money remaining due, and that it was accepted by appellant and put into his stable, or barn, and remained there some time, and in the absence of appellant, Moore came and took it away without leave; that appellant made some ineffectual attempts to recover the team; that Moore, still retaining the possession of the team, sold it as stated, March 25, 1888, to appellee. Under this state of facts the court instructed the jury in substance for the appellee, by the second instruction, that if James Sargeant sold the horses to Moore in the manner above set forth and delivered possession to him, and that if the appellee purchased them of said Moore as claimed, then it should find for the defendant, thus entirely ignoring the vital point of the alleged re-purchase of the horses by appellant for the unpaid purchase money.

This instruction was most clearly erroneous. It entirely ignored the main issue in the case and was misleading in a serious degree; nor was it helped out by the court adding that it should be considered with the other instructions in the case.

The third of appellee's instructions setting up an estoppel against appellant in regard to claiming the team as against appellee, was also erroneous. It informed the jury that if, after appellant had taken possession of said horses from Moore by consent, for failure to comply with the original contract of

sale, Moore the next day took possession of the horses, and appellant was immediately informed of it, but made no effort to re-possess himself of the horses, but on the contrary endeavored to collect from Moore by *capias*, or otherwise, the value of said horses, and knowingly permitted Moore to retain possession of the same, to exercise control and ownership over the same, claiming them as his own, for a period exceeding one month, and that said horses were at said time within five or six miles of where said Sargeant lived, and if appellee purchased said horses for a valuable consideration from Moore, and he was induced and persuaded to do so by the negligence and inaction of appellant, then the verdict must be for the appellee.

There appears to be no sufficient evidence upon which to base the above instruction, and it is erroneous as matter of law. We find no evidence that appellant knew that Moore was claiming the team as his own. The instruction is also argumentative.

It is suggested that if appellant made no effort to regain possession of the horses but endeavored to collect from Moore by *capias* the value of the horses, then he would be estopped to claim title. Now such want of endeavor, if made, would be no ground for estoppel; it might be evidence more or less strong, according to circumstances tending to show that appellant did not claim title, and it might be no evidence of consequence showing that fact. The various points of negligence would not create an estoppel. It would show no bad faith, or that the action of appellant induced appellee to purchase. Every one is bound to know the title to personal property when he purchases, and the owner would not be estopped unless he stood by and saw a person about to purchase and made no claim; he must act in good faith; but the owner of personal property, when wrongfully taken from his possession, is not bound to pursue it diligently and recapture it, under penalty, in case of neglect, of losing title if it is sold to a third party. If a horse be stolen from the owner, is he bound to pursue the thief diligently at the risk of losing title in case the horse be sold, though he would have good cause

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to know the thief would claim title? The instruction is clearly erroneous and damaging to the cause of the appellant and may have induced the verdict of the jury.

These instructions are not cured by any proper instructions given at the instance of appellant. All instructions should be harmonious and not contradictory. The appellant's refused instructions appear to have announced the proper doctrine and should have been given unless they had, in substance, been given, and we are inclined to think they had not.

The appellee's fourth instruction needs some modification at the end of it like this: "unless defeated by a valid prior re-sale from Moore to Sargeant, if one was made."

This would make the sale of Moore to appellee good as against any rights appellant might have to reclaim the property under the conditional delivery by him or James Sargeant to Moore, under the original sale, liable to be defeated by the sale and delivery claimed by appellant in February by Moore to him, if one is established by the evidence before the jury. Otherwise the instruction would not state the case correctly.

For these errors the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

JOSEPH T. BELL

V.

CHARLES B. SMITH ET AL. ,

Attorney and Client—Suit to Recover Fees—Evidence—Instructions.

In an action to recover attorney's fees, it is *held*: That the evidence, though conflicting, sustains the verdict; and that there is no error in the instructions.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Carroll County; the
Hon. WILLIAM BROWN, Judge, presiding.

Messrs. HUNTER & EATON, for appellant.

Mr. JAMES SHAW, for appellee.

LACEY, P. J. This was a suit brought by the appellees against the appellant to recover for services claimed to be rendered to appellant as attorneys at law, in the Supreme Court, at Ottawa, wherein appellant was the appellant and one Johnson appellee, based on an alleged contract between the appellant and appellees to carry the case through the Supreme Court for \$100, made May 22, 1884; on the trial below the appellees recovered the sum of \$73.95, the balance claimed to be due on said fees.

The causes assigned for error are: First, the verdict was against the weight of evidence; and secondly, the court erred in giving appellant's second instruction.

The point of difference between the parties on the question of fact was, that the appellant insisted that the appellees were employed by his father, Francis Bell, and not by him, and the latter insists that appellant employed them on his own account. The suit was undoubtedly that of Francis, being carried on in his son's name for his benefit, the son being the nominal party only.

But the appellees both testify that the contract was made with appellant in his own behalf, and that they looked to him and not the father for their fees. On the contrary, the appellant and his father swear that the contract was made with the father and not the son, and that appellees so understood it. The appellant's evidence was somewhat corroborated by letters addressed by the appellees to Francis, asking for money for the purpose of carrying on the suit, and for fees. In fact, the evidence was conflicting, the testimony on one side being to be weighed against that on the other. It was the province of the jury to decide between the two, and it found, by its verdict, on the side of the appellees. Whether this court would so have decided as an original question is not material. The question is, did the jury have sufficient evidence on which to base its verdict? We are of the opinion it had. The verdict, at least, is not so manifestly against the weight of the

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evidence as that this court would be justified in interfering to set the verdict and judgment aside. As to the complaint of the appellees' instruction, we can only say we do not think it just. The instruction was, in substance, if the jury believed from the evidence that, "if the plaintiffs told the defendant that they would take the case to the Supreme Court for \$100, and that he replied they could go ahead and take the case up, and the plaintiff did take the case to the Supreme Court, then such language would amount to an express contract on the part of the defendant to pay the plaintiff \$100, even though defendant did not say, in express words, 'I will pay you \$100 for taking the case up,' or did not, in so many words, promise to pay them \$100 for that service."

According to the appellee's testimony, this was the language used when the contract was made, and that as appellant signed the appeal bond he said, "if we have success my father will get the benefit of it;" and this was the first time (that is, after the words above recited were used,) that appellees knew he was prosecuting for the benefit of his father.

The instruction was simply based on appellees' evidence and theory of the case. The appellant testified that he "never made any agreement whatever to pay their fees." "When I was going out of the office Smith says to me, 'Shall we go ahead with this case?' I said, 'You can do whatever father wants you to do, for it is no case of mine.'" This, in substance, is corroborated by the father.

We think the instruction, under the state of the evidence, was not misleading. If, under the circumstances, the words were used as appellees testified, undoubtedly there was a contract on part of appellant to pay the fees. This was for the jury to decide under the instructions. The words used in the instruction are wholly denied by appellant and his witness. The words, if spoken, show that he was not acting as the agent of his father, but for himself. The appellant was favored by the court by full instructions on his part on his theory of the case. The instructions taken together, we think, present the case fairly. There being no error in the record, the judgment is affirmed.

Judgment affirmed.

JOHN A. ROEBLING'S SONS COMPANY

V.

THE LOCK STITCH FENCE COMPANY.

Sales—Contract for Future Delivery—Breach of—Tender—Instructions—Interest—Evidence.

1. Where one contracts to deliver personal property in the future, at a certain price, and the vendee agrees to receive and pay for it at such time in accordance with the agreement, but afterward, and before the time arrives for delivery, repudiates the contract and gives the vendor notice of his intention not to perform it, the latter may accept such notice and elect to consider the contract at an end, and sue at once to recover damages for the breach, or he may decline to consider the contract annulled, and demand its performance on the part of the other party.

2. Where a certain commodity is sold to be delivered in installments, the failure of the seller to deliver the quantity required as to any installment gives the purchaser the power to rescind the entire contract.

3. Although the mere formal act of tender or offer to perform on the part of the vendor may be dispensed with where the vendee gives notice that the goods will not be accepted even if tendered, the vendor must be in position to perform if the notice be recalled.

4. One can not complain of instructions which, though erroneous, are favorable to himself, nor of a refusal to give an improper instruction.

5. In the case presented, evidence as to the amount which the refused wire brought at public auction was properly excluded.

6. It seems that goods, when tendered, must be in condition for immediate delivery, and not subject to any lien for freight, storage, or other charge which it is the duty of the vendor to liquidate.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Will County; the Hon. GEORGE W. STIPP, Judge, presiding.

Messrs. C. W. BROWN and F. BENNITT, for appellant.

The vendor of personal property, in a suit against the vendee for not taking and paying for the property, may sell the same, and recover the difference between the contract price and the price of re-sale. *Bagley v. Findlay*, 82 Ill. 524;

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Saladin v. Mitchell, 45 Ill. 84; Ullman v. Kent, 60 Ill. 272; Benj. on Sales, 3d Ed., p. 777.

Where goods are sold, to be delivered in the future, the vendee can not create a breach of the contract by giving notice that he will not receive the goods. Kadish v. Young, 108 Ill. 170; McPherson v. Walker, 40 Ill. 371; Chamber of Commerce v. Sollitt, 43 Ill. 519.

The rule is, if one bound to perform a future act, before the time for doing it declares his intention not to do it, this, of itself, creates no breach of his contract; but, if this declaration be not withdrawn when the time arrives for the act to be done, it constitutes a sufficient excuse for the default of the other party. McPherson v. Walker, 40 Ill. 371; Cummings v. Tilton, 44 Ill. 173; Benj. on Sales, 3d Ed., p. 748, Sec. 760.

In actions upon contracts it is necessary to aver in the declaration performance, or an offer to perform, on part of the plaintiff, but it is never necessary to *prove* the performance of a condition which has been waived or dispensed with by the defendant. A condition once waived is gone forever, and the performance of it can not thereafter be required. McPherson v. Walker, 40 Ill. 371.

Messrs. GEO. S. HOUSE and FRY & BABB, for appellee.

The refusal of appellee, April 27th, to further perform, did not of itself constitute a breach of the contract. It gave appellant an election to terminate the contract, or to continue it in force. Electing the latter, as it did April 29th, it kept the contract alive for the defendant, as well as itself, and was bound to show such performance on its part as would have been required if the defendant had never refused to perform. Johnstone v. Willing, 55 L. J. R. 162; S. C. L. R. 16 Q. B. Div. 470; McLellan v. Winston, 12 Ontario Rep. 439; Kadish v. Young, 108 Ill. 170; Frost v. Knight, L. R., 7 Exch. 111; Dingley v. Oler, 117 U. S. 503; Smoot's Case, 15 Wall. 36; Benjamin on Sales (4th Ed.), Sec. 568; Norrington v. Wright, 115 U. S. 205; Cleveland Rolling Mill v. Rhodes, 121 U. S. 264; Brigham & Co. v. Carlisle, 78 Ala. 247.

Appellant failed to show such performance as its election

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required, in that it had no wire ready for delivery from April 27th till May 24th. *Norrington v. Wright*, 115 U. S. 188; *Filley v. Pope*, 115 U. S. 213; *Pope et al. v. Porter et al.*, 102 N. Y. 371; *Salmon v. Boykin*, 6 Cent. Rep. (Md.) 485; *Hime v. Klasey*, 9 Ill. App. 166.

The instruction for interest upon \$234.93 was properly refused. Granting that such sum was due, yet, as the instruction was for interest only, in case the jury found "such sum or sums were unreasonably withheld," it was properly refused, because there was no evidence upon which to base an instruction upon that ground. *Sammis v. Clark*, 13 Ill. 544; *Hitt v. Allen*, 13 Ill. 592; *Aldrich v. Dunham*, 16 Ill. 403; *Devine v. Edwards*, 101 Ill. 138; *West Chicago Alcohol Wks. v. Sheer*, 104 Ill. 589; *Moshier v. Sheer*, 15 Ill. App. 342.

The instruction was properly refused, because it only required the jury to find that the money was "unreasonably withheld," when it should have required them to find both unreasonable and vexatious delay in payment. *Devine v. Edwards*, 101 Ill. 138; *West Chicago Alcohol Wks. v. Sheer*, 104 Ill. 589.

LACEY, P. J. The appellant, a corporation duly organized under the incorporation laws of the State of New Jersey, sued the appellee, a corporation duly organized under the laws of the State of Illinois, in an action of assumpsit for breach of contract. The appellant was engaged in the manufacture and sale of fence wire, located at Trenton, New Jersey, and the appellee was engaged in the preparation of the wire for fencing by putting barbs on it, and also in the sale of such wire fencing material, land was located at Joliet, Will county, State of Illinois. On the 7th day of March, A. D. 1885, the appellant and appellee entered into a contract for the sale by the former to the latter of five hundred tons of galvanized wire by means of a proposition made by appellee in a letter, dated March 3, 1885, at Joliet, and sent to appellant at Trenton, New Jersey; the proposition being accepted by it on the 7th March, 1885, by means of a letter sent to appellee at Joliet in reply.

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By the terms of the proposition and acceptance the wire was to be in porportion of 78 per cent. No. 12 and 22 per cent. No. 13, at a price of \$3.65 per 100 lb, delivered in Joliet between the 3d of March and July 1st, at the rate of twenty tons per week, until appellee should order differently. The shipment of twenty tons per week was to commence after filling an old order shipping the same quantity per week. The payment was to be made for the wire in sixty days from receipt of the wire, with two per cent. off for cash paid in ten days at the option of the appellee. As we understand the evidence (deposition of Roebling), the first shipment of the wire on the last contract was made March 18, 1885, in car No. 5117, in which was a total of wire of 40,136 lb, of which 20,998 lb applied on the last contract, and 19,138 were for the completion of a former contract, the wire arriving in Joliet seven days later. The appellant then continued to ship the wire to appellee and it to accept it under the contract till the amount of 240,173 lb were received, the last shipment of such amount being April 21, 1885, arriving on the 27th of the same month. That on the 29th of the last named month the appellees sent a telegram to appellants that it would take no more wire even if shipped; that it could not use the quality. This telegram was confirmed by letter of the same date also refusing to accept any more wire on account of the bad quality of the wire already shipped. To this telegram and letter the appellant replied that it could not agree to stop shipment, that all the wire had been tested before shipment. The appellee also, by telegram of May 18, 1885, in reply to appellant's letter of May 15th, says, that the letter was received and that it "will not receive wire if shipped;" and answer was received from appellant saying it would not stop shipping and insisting on holding appellees to the contract. The total amount the appellees refused to receive was 759,896 lb. The amount that was refused was sold in Joliet at public auction and brought \$3,293.86 less than the contract price, this being about the amount of the decline in the price of wire which took place after the contract was entered into. There was a balance due the appellant on the amount of wire received under the con-

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tract of \$234.93, for which amount only it recovered, without interest, in the court below, the claim for damages on account of the refusal of the appellee to receive the balance of the wire being rejected by the jury. From the judgment this appeal is taken.

There is no complaint by the appellant of any action of the court in the matter of the instructions, except, perhaps, as to its refusal to give an instruction asked for, pertaining to the question of interest on the balance due on the wire received by appellee. The instructions on the main issue concerning the breach of the contract by appellee were as favorable for the appellant as it could, or in fact did, ask.

The second given instruction on behalf of the appellant informed the jury that if appellee notified the appellant "that it would not receive any more wire under the contract and the appellant should not ship any more wire thereunder, and that appellee would not receive it if shipped, and if such directions were never rescinded or withdrawn, that if, at the time appellant was ready and willing to perform the contract on its part, etc., then appellant had a right to recover damages;" and, in addition to the above instruction for appellant, by the fourth instruction, the jury was told that "then such notice on the part of appellee would excuse appellant from an actual tender of the wire so bargained and sold, and that it is sufficient under the issues in this case, upon this question, for the appellant to show such readiness, ability and offer to perform the contract on his part;" *i. e.*, that it was able to perform when it received the notice. The court on its own motion gave an instruction embodying about the same law. We are of opinion that the court erred in those instructions in favor of the appellant and in no wise against him.

The main questions of law involved in this case have been thoroughly considered and settled in *Kadish et al. v. Young et al.*, 108 Ill. 170, and we shall do no more than attempt to state what we understand the rule to be as there announced in such cases. As we understand the law the rule is that where one contracts to deliver an article of personal property, in the future, at a certain price, and the con-

tractee agrees to receive and pay for it at such time in accordance with the agreement, and afterward, and before the time arrives for delivery, repudiates the contract as far as he is able and gives the contractor notice of his intention not to perform it, the latter may accept such notice and elect to consider the contract at an end and sue at once to recover damages for the breach, or he may refuse to allow the contract to be annulled and demand its fulfillment on the part of the other party.

In case he pursues the latter course the contract is regarded in force the same as though no notice of abandonment had ever been given by the other party and he must hold himself ready to perform the contract at the time it should have been performed according to its terms, as, at any time before or at the time of fulfillment arrives, the contractee may change his mind and demand its fulfillment by the contractor. In respect to the barley contract which was the subject of the decision in *Kadish et al. v. Young et al.*, *supra*, the court say: "It is obviously absurd that it could have been appellee's (the contractor's) duty to have sold barley in December to other parties, which it was their duty to deliver to appellants and which appellants had a legal right to accept in January," although they had given notice they would not accept appellee's refusal, in that case choosing to hold the contract in force.

If we understand it, the above instructions, given for appellant, told the jury if the appellant was, at the time of receiving the notice, ready and willing and able to perform, and offered to perform the contract on its part, and the notice never was withdrawn, then, as stated in the second instruction, appellant could recover, and as also stated in the fourth, neither was any tender of the wire necessary, as the contract contemplated.

These instructions would have been correct if the appellant had, upon receiving the notice, chosen to allow the contract to be annulled according to the notice and had been suing for the breach of it occurring at that time, but that was not the case; it was attempting to sue on the contract the same as though notice had never been given, and the breach had taken

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place weekly for failure of appellee to receive and pay for the twenty tons of wire per week. The appellant should have been prepared at Joliet, where the delivery was to be made, to deliver the twenty tons each week, and offered to deliver the same unless excused from so doing on account of the notice previously given by appellee that it would not accept it. Though there was an error in the appellant's instructions it was in favor of it and, of course, it can not be heard to complain.

The only point, except in reference to the refused instruction concerning interest, is as to whether there was sufficient evidence, or rather want of evidence, to sustain the verdict of the jury. The main point of the defense rested on the claim that appellants had no wire at Joliet ready for delivery to appellees under the contract from April 27th till May 24th. The first named date was when the last car load of wire arrived at Joliet, and the last named date when the next car load arrived. It appears during that time the appellant had no wire in Joliet from which it was able to deliver the twenty tons per week. This time was about three weeks and six days. It is also insisted that from May 24th to June 26th all the wire offered to appellee was subject to a freight charge of \$399.94, which was not paid until the latter named date, and that until the freight was paid appellant could not deliver it. It appeared that the appellees had received some six shipments of the wire from March 25th to April 27th, both dates inclusive, making about 120 tons, which was received on the contract and must be regarded as a fulfillment of it up to the latter date, when the appellee's notice to quit shipping was given. It is insisted by appellant that the first shipment, received on March the 25th, can not count on the fulfillment of the above contract because the old contract was not completed till that date, and the fulfillment was to commence on the new after the old was completed; but we can not view the matter in that light, for the wire was tendered and accepted on the new and the old was completed at the same time. The parties by their action had given this construction to the contract to be the true one as to the date to commence, and the

jury had the right to find that this was the proper one. From the time the contract was repudiated, April 27th, until May 24th, there was no wire in Joliet out of which the tender could have been made by appellants, leaving a space of three weeks' delivery that the appellant was not in condition or able, in Joliet, to make, even in case it had been called upon at any of the times when the wire was due to make the delivery. The appellant argues that if the shipment was made of twenty tons per week within the time required, that that fulfilled the contract as to the delivery. We do not so read the contract. The letter of acceptance written by appellant is that the wire was to be delivered, not shipped, at the rate of twenty tons per week—delivered in Joliet. But even if that were so, the quantity was not even shipped within the time required by the contract. The law appears to be well settled that in a case like this, where a certain commodity is sold to be delivered in installments and received in that manner, the failure of the seller to fulfill the contract in the particular of not delivering the quantity required as to either of the installments, gives the purchaser the power to rescind the entire contract. In the contract of merchants, time is the essence of the contract. *Norrington v. Wright*, 115 U. S. 188, and cases cited; *Filley v. Pope*, 115 U. S. 219. It is contended by appellant, it was not necessary to tender, or even to be prepared to tender, the wire to the appellee until he had given notice of his willingness to accept it after the notice that he would not, and the case of *McPherson v. Walker*, 40 Ill. 371, is confidently relied on to support such claim.

The instruction sustained by the Supreme Court was this: If the defendant gave the plaintiff previously to understand that he would not accept the oats, the commodity contracted to be delivered on the day fixed by the contract, "then an offer or tender of the oats by the plaintiff is excused and the jury must find for plaintiff." It is questionable whether this case is not overruled by the case of *Kadish et al. v. Young et al.*, *supra*; at all events the court in its opinion in the latter case does hold that the seller must be prepared and ready to deliver the goods until after the day of performance is past

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in case the purchaser changes his mind and notifies him he will take them; hence, for that very reason, the vendor is not required to re-sell in order to save the purchaser from damage, or do any other act to save him. It may be, and we are inclined to so hold to make the two opinions harmonize, that while the notice remains standing and unrecalled, given by the purchaser, that he will not accept even if the goods are tendered, the mere formal act of tender or offer to perform may be dispensed with; but we can not believe that the seller is relieved from being in readiness on the day when the delivery is to be made, to fulfill by delivering the goods, if he gets a notice from the vendee that he will take them. The theory of the law is that the contract is kept alive and in force for the benefit of both parties and this alone is done at the option of the seller. It follows, therefore, that he, at least, must be ready to perform on his part. If he does not want to perform the contract he must treat it as rescinded at the time of getting the notice or before the notice is withdrawn. The declaration in this case goes on the theory that the contract was alive and that the goods were tendered and the appellee refused to accept and pay for them.

As to the other point, in regard to the freight charges not having been paid, we find support for appellee's claim that the goods must be in a condition for immediate delivery, and all freight paid when the tender is made, in *Dunham v. Pettie*, 4 E. D. Smith, 500; but whether in a case like this, where, perhaps, the matter of a formal tender is dispensed with, we need not decide, as its decision is not necessary for the determination of the case, and we therefore leave the question unsolved so far as this court is concerned. We think, however, that the appellant should have had the wire present in Joliet at the time the respective deliveries should have been made, so that in case appellee had desired, it could have been immediately delivered. The evidence, as we think, sustains the verdict. As far as the question of interest is concerned we perceive that it is a small matter, about \$20, and had it not been for the fault of the appellant in not asking the proper instruction in regard to interest being payable on all

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written contracts from the time they are due, the jury would have been properly instructed. But instead of that an inaccurate instruction was presented to the court seeking to recover on the grounds of "unreasonable and vexatious delay in payment" of the balance due on the wire already delivered; thus asking the court to present an immaterial matter to the jury and that in an erroneous manner, even had such rule been involved. It was sought to recover interest on account of unreasonable delay in payment without adding "and vexatious." The court was not bound to give the instruction as asked, and no other on the subject was presented. The exclusion by the court of the evidence pertaining to the amount the refused wire brought was not error, as it was sold on credit, and, under the state of the evidence and verdict, it could not have harmed appellant even if proper. There was evidence of a large decline in wire and nothing recovered.

The judgment is therefore affirmed.

Judgment affirmed.

JOSEPH CONDELL

V.

G. SNYDER ET AL.

Contract for Sinking Well—Action to Recover Balance—Conflict of Evidence—Instructions.

In an action to recover a balance claimed to be due on a contract for sinking a well, this court declines to interfere with the verdict, the evidence being sharply conflicting and there being no error in the instructions.

[Opinion filed December 8, 1888.]

APPEAL from the County Court of Lake County; the Hon. FRANCIS E. CLARKE, Judge, presiding.

Messrs. WHITNEY & UPTON, for appellant.

Mr. CHARLES T. BACKUS, for appellees.

LACEY, P. J. This was a suit originally brought before a justice of the peace to recover the contract price claimed to be due to appellees for sinking a well on the farm of the appellant, and upon appeal tried in the County Court. In the County Court the case was tried by a jury and the verdict and judgment were for appellees, for \$60 and costs. From such judgment this appeal is taken.

The appellees contended that the contract was to furnish a well that supplied stock water; that it was not warranted to be free from sand; that they did sink such a well, and that appellant refused to pay them because it was not clear from sand.

The appellees further contend that they could have procured pure water by going deeper, but appellant refused to allow them to do so unless at their own expense. The well was to be dug at so much per foot. On the other hand, appellant contends that the well was to furnish plenty of good water free from sand; that the well was to be sunk in an old well and so much paid for piping the old well and so much for sinking and piping further; that appellees guaranteed to procure good water without sand for 100 or more cattle; that the pump could be worked with the wind-mill appellant then had; that one-half was to be paid down and appellant to take the chances, the balance to be paid when the work was completed. The one-half was paid as agreed. The appellant contended that the well was valueless on account of the sand that was pumped up. The evidence in regard to the terms of the contract and the finishing the well in accordance therewith was conflicting. The case of appellees was supported by their own testimony and two other witnesses.

If what they testified to was true, they had a right to recover. On the other hand, the appellant supported his side of the case by his own testimony and that of his hired man, Metzner. Thus there was a sharp conflict of the evidence. Under the circumstances it was for the jury to decide, and its verdict should not be disturbed unless clearly against the weight of the evidence. We can not say that it is so. Some

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complaint is made in regard to the appellees' instructions, but on examination we find them substantially correct, though probably not in the best form. The appellant's given instructions were full and all that could be asked, and the refusal to give others was not error. Seeing no error in the record, the judgment is affirmed.

Judgment affirmed.

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AMERICAN CENTRAL INSURANCE COMPANY

V.

LAWRENCE CLAREY.

Insurance—Condition—Vacancy—Negligence.

In an action on a policy of fire insurance, it is *held*: That, under a clause providing that the policy should become void if the house should become vacant or unoccupied, the owner can not be charged with *laches* in regard to a vacancy occasioned by the removal of his tenant on the day of the fire without the knowledge of the plaintiff.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Knox County; the Hon. JOHN J. GLENN, Judge, presiding.

On the 27th day of May, 1886, the American Central Insurance Company issued the policy of insurance offered in evidence, insuring the dwelling of Lawrence Clarey for the period of one year, the property insured being described in the policy as "a dwelling house occupied by a tenant." On the 19th day of April, 1887, at about 10 o'clock p. m., the insured premises were destroyed by fire. At the time of the fire the house was vacant and unoccupied.

Prior to the fire the house had been occupied by one Elijah Sprinkle, a hired man in the employ of Lawrence Clarey. Sprinkle, however, moved out of the house between the hours of eight and ten o'clock in the forenoon on the day the

fire occurred, and as the proof shows, without the knowledge of the appellee, the house remaining vacant and unoccupied up and until it was destroyed. Under these facts, appellants suggested to the court the following proposition of law, which was by the court marked "refused":

"If the court finds from the evidence that the premises insured became vacant and unoccupied on the 19th day of April, 1887, about the hour of 10 o'clock A. M., and that they were destroyed by fire about the hour of 10 o'clock P. M. of said day, and at that time they were also vacant and unoccupied, then, under the policy offered in this case, the law is that the plaintiff can not recover."

MR. FOREST F. COOKE, for appellant.

The policy introduced in evidence in this case is the contract entered into between the company and Lawrence Clarey. Its provision that, "if the premises be, or become vacant or unoccupied," that then the policy should become void and of no effect, was a warranty on the part of appellee, binding upon him, a condition, the strict fulfillment of which was a condition precedent to a recovery, under the policy sued on. The condition was plain, intelligent, reasonable, unambiguous, and it being entered into by parties competent to contract, should be enforced. If the premises at the time they were destroyed were vacant and unoccupied, as concededly they were, then no matter over what length of time the vacancy and unoccupancy had extended, the company can not be called upon to respond. Appellee knew when he accepted the policy, that appellants would not bear loss that occurred while the property was vacant or unoccupied, no matter under what circumstances the vacancy occurred. In support of the proposition of law suggested to the court on the trial of this cause, and which was by the court marked refused, we cite the following authority, which we confidently believe sustains appellant's position in the case: *Niagara Fire Insurance Co. v. Drda*, 19 Ill. App. 70; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 168; *Hartford Fire Ins. Co. v. Webster*, 69 Ill. 392; *Cook v. Continental Ins. Co.*, 70 Mo. 610; *McClure v. Water-*

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town Fire Ins. Co., 90 Pa. St. 277; *Ætna Ins. Co. v. Myers*, 63 Ind. 238; *Farmers Ins. Co. v. Wells*, 42 Ohio St. 519; *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533; *The Glendale Manfg. Co. v. Protection Ins. Co.*, 21 Conn. 18; *Marshall on Insurance*, 249; *Ripley v. Ætna Ins. Co.*, 30 N. Y. 158; *Herrmann v. Adriatic Fire Ins. Co.*, 85 N. Y. 162; *Ashworth v. Builders' Mut. Fire Ins. Co.*, 112 Mass. 422; *Harrison v. City Fire Ins. Co.*, 9 Allen, 231.

Mr. J. A. McKENZIE, for appellee.

Even had the pleas relied upon avoided the policy by reason of the premises having become vacant or unoccupied, before the policy would be null and void for that reason, it must be such a vacancy and unoccupancy as would reasonably be understood as contemplated by the insurer and the assured. It is not every unoccupancy that avoids the policy. "A practical occupancy, consistent with the purposes or uses for which it was insured, was intended." *Wood on Ins.*, 209; *Whitney v. Black River Ins. Co.*, 9 Hun, 39; *Stupetski v. Trans. At. F. Ins. Co.*, 43 Mich. 373.

This building was insured as a tenement house and the usual and ordinary risks and vacancies incident to a change of tenants was to be expected, and was in the minds of the contracting parties. *Gates v. Mattison Mut. Ins. Co.*, 5 N. Y. 469; *Joice v. Maine Ins. Co.*, 45 Me. 168.

This house was insured as being occupied by a tenant. In the case last above cited, the court say: "It would be unreasonable to imply that the defendant entered into the contract with the expectation that the then tenant was to continue in the occupancy during the running of the policy, in the absence of anything showing that sort of understanding."

"The object of courts, when enforcing a provision in a policy like this, should be, to endeavor to so construe it as to give effect to what might reasonably be supposed to have been the intention of the parties when they consented to it." *Phoenix Ins. Co. v. Tucker*, 92 Ill. 71.

Even when a school house or church is insured with the provision making the policy void if they become vacant and

unoccupied, a vacancy or unoccupancy of the church from Sunday until Sunday, or of the school house from Friday until Monday, would not avoid the policy, because such unoccupancy or vacancy would be in the minds of the contracting parties. *American Ins. Co. v. Foster*, 92 Ill. 337; *Whitney v. Black Riv. Ins. Co.*, 72 N. Y. 118.

LACEY, P. J. The court before which the cause was tried gave judgment against the appellant for the amount of the insurance, and to reverse that judgment this appeal is taken.

The only cause insisted on for reversal is the refusal of the court to give the above proposition of law asked for by the appellant. Whether or not the court erred in such action depends upon the construction to be given to the clause in the insurance policy in regard to the policy being void in case the house should become vacant.

The clause under consideration reads as follows:

"This policy shall be null and void if the premises shall be used or occupied so as to increase the risk, or be or become vacant or unoccupied, or cease to be used or occupied for the purposes herein, or if it be a manufacturing establishment and shall run in whole or in part at night or over extra time, or if it shall cease to be operated, or the risk be increased by the erection or occupation of neighboring buildings, or by any means within the knowledge or control of the assured."

As we understand it, the proper interpretation to be given to the above provision of the policy is that the last clause refers back to and modifies the preceding clauses, and in doing so, modifies the clause regarding the vacancy. Therefore it should be construed to read: "The policy shall become void if the house shall become vacant by any means within the knowledge or control of the assured to prevent." That is, if he could prevent it and did not, the policy should become void. It is evident, therefore, that the assured, not having any knowledge of the vacation of the house by the tenant, and it being vacant so short a time before the fire that he could not discover the fact and place a tenant therein, he should not be held to *laches* in regard to the vacancy. The proposition of law was therefore properly refused and the court committed no error

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in doing so. A similar provision in an insurance policy has been construed as we interpret this, in *N. A. F. Ins. Co. v. Ziegler*, 63 Ill. 465. The policy construed in *N. F. Ins. Co. v. Drda*, 19 Ill. App. 70, is not set out in the opinion, and we can not say whether it is the same as the one in this case or not; but, however that may be, this court must be governed by the decisions of the Supreme Court. This being the only question involved in this case and being decided adversely to the appellant, the judgment of the court below is affirmed.

Judgment affirmed.

ABRAM H. LICHTY
V.
ELI L. LOWER ET AL.

Principal and Surety—Contribution—Note—Chattel Mortgage on Farm Stock—Estoppel—Agency—Instructions.

1. In an action against the agent of the owner of a certain farm to recover the amount paid by the plaintiffs as co-sureties with him on a promissory note given by the tenant on said farm to secure the payment of money borrowed from the landlord, the plaintiffs having signed said note as sureties with the defendant, upon his promise that he would apply certain moneys to be derived from the sale of stock on said farm, which would pass through his hands, to the payment of said note, and upon his assurance as agent of the lender that a mortgage on the interest of said tenant in said stock would be good security, it is *held*: That the defendant can not now be permitted to show that the stock was the property of the landlord, the tenant having failed to pay for the interest claimed therein; and that the verdict for the plaintiffs should be sustained.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Carroll County; the Hon. RICHARD S. TUTTILL, Judge, presiding.

Mr. JAMES SHAW, for appellant.

Messrs. HUNTER & EATON, for appellees.

C. B. SMITH, J. It appears from this record that W. A. Gorgus owned a farm of about 500 acres in Carroll county, and that B. F. Aiken and his son Frank were his tenants, and that appellant, Abram H. Lichty, was the general agent of Gorgus, who lived in Pennsylvania. B. F. Aiken wanted to borrow \$275, and in his efforts to find a lender he sought the assistance of appellant. This was in November, 1884. Appellant informed Aiken that if he could get appellees, Lower and Keim, to go on a note with him he could get him the money. Aiken wanted the money to use on the farm and to assist his son to get married. Appellees at first refused to go on the note, but after being urged to do so both by Aiken and Lichty they finally consented to and did sign the note, but before having signed, both Aiken and appellant promised and agreed that Aiken should secure them with a chattel mortgage on his half interest in the stock on the farm.

The mortgage was not executed as agreed at the time, and some time after, Keim called on appellant for the mortgage. Appellant then informed him that Aiken would not give the mortgage on his interest in the original stock, but would on its increase. Appellees refused to accept such a mortgage, and no security was given. The note became due and Aiken informed appellant that he could not pay it. Appellant then advised Aiken to go and see appellees and try and get them to renew the note. This they refused to do. Again both Aiken and appellant urged appellees to renew the note, and to induce them to do so appellant agreed to sign with them, and also agreed that Aiken should execute his mortgage on his interest in the stock on the farm. As a further inducement to get appellees to renew the note, appellant assured them that he would have charge of the stock and would manage the whole business, and that when the stock in the mortgage was sold, the money would come to him and he would pay off this note and keep his co-sureties harmless. Appellant denies this arrangement, but the great preponderance of the evidence is against him. This second note fell due and was not paid by Aiken. The mortgaged property had in the meantime been sold by Aiken and converted into money, and paid to appel-

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lant largely more than enough to pay this note. But after the note fell due he refused to pay more than one-third of the note, which he did pay, and appellees paid the other two-thirds. Appellant claimed that Aiken had never paid for his interest in the stock to Gorgus, and having so failed, that he never obtained any title to the property mortgaged, and that, upon a settlement between Gorgus and Aiken, Aiken was largely indebted to Gorgus, and that the proceeds of the stock therefore belonged to Gorgus. Appellees bring this suit to recover the amount they paid on this note back from appellant. We think the proof amply shows that appellant did agree and promise that if appellees would go on this note with him that he would have the control and management of the farm and the sale of the stock, and the money would pass through his hands, and that he would apply what was necessary to pay this note. Appellant, acting as the agent for Gorgus, assured appellees that a mortgage on this property would be good security and protect them from loss. He can not now be permitted to assume a different attitude.

Again, Gorgus himself, on February 15, 1876, takes a second mortgage on this same property mortgaged to appellees, and in that mortgage he expressly recognizes the validity of the first mortgage and takes his subject to that, so far as that property is concerned.

There could be no legal justification for appellant paying this money to Gorgus or for retaining it himself, and it was his duty when he received it to have paid off this note, and having failed to do so he must now do it.

The case has been submitted to two juries and both have found against appellant, and we are satisfied with the finding. Appellant insists that the court erred in giving instructions for plaintiffs, and in refusing instructions for defendant.

We think there was no error in the giving or refusing instructions. The jury was fully and fairly instructed.

Judgment affirmed.

LACEY, P. J., dissenting. I am of the opinion that the court below erred in giving the 1st, 2d and 3d of appellees'

instructions. The evidence in my opinion was quite close and in such condition that the instructions should have been accurate. In the instructions the court assumed that the money received from Aiken by appellant for the sale of the mortgaged property was with an agreement to apply it on the note. In this the instructions were misleading and for this error I am of the opinion that the judgment should be reversed.

JOSEPH L. AVERY
V.
GEORGE B. SWORDS.

Negotiable Instruments—Note—Payment without Surrender—Agency—Negligence—Amendment—Instructions—Evidence—Notice.

1. A promissory note in the hands of a third person can not be affected or incumbered by private independent agreements between the parties thereto.

2. It is gross negligence on the part of the maker of a note to pay the same without having it surrendered to him, or being certain that the payment is to the proper party.

3. Where one of two innocent parties must suffer loss the one whose negligence caused such loss must bear the same.

4. In the case presented, it was improper to allow the defendant to withdraw the general issue and file a special plea of payment, after a different presiding judge at a former term had refused such motion.

5. An endeavor to collect from a third person funds wrongfully collected and withheld by him, is no waiver of the right to proceed against the debtor who carelessly and negligently placed them in the hands of such third person.

6. An instruction which singles out a single important fact in the case, is improper.

7. An agency may be shown by the acts of the parties. The evidence in the case presented does not show that a third person was the agent of the plaintiff to receive payment of the note in question.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Livingston County; the
Hon. ALFRED SAMPLE, Judge, presiding.

Avery v. Swords.

Messrs. WALLACE & TERRY, for appellant.

Swords was in law bound to know that Culver was the agent of Avery, and had the right to receive this money. Dutcher v. Beckwith, 45 Ill. 460.

A note transferred before due to a *bona fide* holder without notice can be recovered on. Farlin v. Lovejoy, 29 Ill. 45; Calkins v. Vail, 31 Ill. 166; Murray v. Beckwith, 81 Ill. 43; National Bank of Olney v. Baird, 3 Ill. App. 239.

A special agreement between parties to a note or bill, not indicated in the note itself, can not be set up against a purchaser for value before due and without notice. Rice v. Ragland, 10 Humph. 545; S. C., 53 Am. Dec. 737.

The presumption of law is that the assignment is *bona fide* and for value. Persons questioning it must prove it. Wightman v. Hart, 37 Ill. 123; Depuy v. Schuyler, 45 Ill. 306; Richards v. Betzer, 53 Ill. 466.

Messrs. STRAWN & PATTON, for appellee.

C. B. SMITH, J. This is a suit brought on a promissory note for \$560 by Joseph L. Avery, the appellant, against George B. Swords, the appellee. The note in controversy was executed by Swords to one Joseph Morgan and assigned before due to appellant. The record discloses this state of facts: In 1873, appellee bought 160 acres of land from Joseph Morgan and as part payment thereof he executed three notes to Morgan, all dated February 3, 1874.

The first was for \$500, due March 1, 1875; the second for \$600, due March 1, 1878, and the third for \$560, due March 1, 1879.

A trust deed was also executed to secure the payment of all these notes with one J. F. Culver as the trustee. The notes and trust deed were executed at the bank of J. F. Culver in Pontiac, Illinois.

Almost immediately after this transaction Morgan moved to Wolfsborro, New Hampshire, and deposited these three notes with others and the trust deed in a savings bank, of which Avery was treasurer, for safe keeping. On March 16,

1874, Morgan placed the first two of these notes with appellant as collateral security for the payment of a lot of land he bought from appellant. The last note remained in the bank subject to the order of Morgan. The first note was paid before it was due and was paid at the bank of J. F. Culver, where the note was sent by appellant at the request of Morgan, who then still owned the note. The second, or \$600 note, was paid at maturity and was collected by appellant through the National Bank of North America of Boston. That bank sent it to Culver's bank for collection and it was paid by Swords in that bank. At the maturity of the last note for \$560, the one now in controversy, appellant placed it in the Lake National Bank of Wolfsborro for collection. The note was protested March 4, 1879. After appellant learned of the protest he wrote Swords. Swords made no reply but took the letter to S. S. Lawrence, an attorney at law, who made this reply to Avery's letter of inquiry:

"PONTIAC, March, 19, 1879.

"JOSEPH L. AVERY:

"*Sir*: Yours of 12th inst. to George B. Swords is placed in my hands by him, with instructions to answer. He says he paid the note long ago to Morgan's agent, Joseph F. Culver. When Mr. Morgan was here he told Swords he might pay the money in at any time to Culver and he would allow a discount of eight per cent. per annum for unexpired time on all sums paid before due. A little over a year ago he paid to Culver the balance due on the mortgage to Morgan, or to Culver as trustee for Morgan, and he then released the mortgage of record. If Morgan has not got his money it is not Swords' fault. Morgan must look to Culver, his agent.

"S. S. LAWRENCE."

After appellant had been informed that the note was paid to Culver long before it was due, he wrote to Culver about it and in response to that letter he received the following letter:

"PONTIAC, April 6, 1879.

"JOSEPH L. AVERY:

"*Sir*: When Joseph Morgan sold his farm to Swords, I

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was made trustee and notes were made payable at my office, with the agreement that upon all money paid by Swords before due, he should receive a discount. This was subject to a prior incumbrance which fell due January 1, 1878, and to effect a new loan Swords had to have a clear title. He raised part of the money and applied for enough more to pay last of the Morgan notes. Out of the new loan, \$1,500, after discharge of the prior mortgage, there was enough with the former deposit to pay off the last Morgan note, and I released the trust deed, intending to pay off the note. Being unable to sell real estate at any price, I was unable to meet my obligations; but if my creditors will give me a little time, I expect to pay in full.

“JOSEPH F. CULVER.”

Swords paid all three of these notes to Culver. The first and second notes were at Culver's bank when he paid them and he took them up. He also paid the interest on all these notes to Culver.

He swears, and it is true, that he paid the last note to Culver nearly a year before it was due, but did not get his note. Culver told him the note was in New Hampshire but that he would write and get it. Culver then released the trust deed.

Shortly after this transaction appellee asked Culver if his note had come yet and Culver told him it had not but he expected it every day. Culver, who now claims that he was acting for appellant in receiving this money, allowed nearly a year to pass before he informed Avery that he had collected the money, and then only after Avery had written him about it, and after he had closed the doors of his bank and refused payment.

Shortly after his failure in business he moved to Kansas with his family. So far as this record shows Avery did nothing more toward collecting this note until in March, 1882. He then wrote to an attorney saying he had a claim against Culver and desired him to see what could be done toward collecting it. Having received no reply to this letter he again wrote the same attorney in April following, asking for an

answer to his letter. After the failure of this correspondence to get anything out of Culver appellant commenced this suit. Three trials before the Circuit Court have been had. The first one resulted in a verdict for the defendant. On motion of the plaintiff the verdict was set aside and a new trial granted. On the second trial the jury disagreed and were discharged without a verdict. On the third trial the defendant again had a verdict. The court overruled a motion for a new trial and gave judgment on the verdict for the defendant.

The case is now brought before us for review on appeal. The long contest in the court below has induced us to give the case a careful and patient investigation. The appellant urges that the court erred, first, in allowing the defendant to withdraw the general issue and plead a special plea of payment after a different presiding judge at a former term had refused that motion. Second, that the court erred in the admission of testimony prejudicial to the appellant and also erred in giving and refusing instructions.

The material and central fact in the controversy is whether Culver was the agent of Avery at the time he collected the last note from Swords. If he was, then Swords would be justified in paying him the note and would be discharged; but if he was not the agent, then he had no right to collect the money from Swords, and Swords would not be protected in his payment.

Appellee does not claim any express or direct agency but seeks to show such agency from the course of business and the acts of Avery, Culver, Morgan and himself. Of course, an agency may be shown by the acts and conduct of parties as well as by direct authority.

There is no claim in this record that Avery ever had anything to do with or knew anything about the sale of the land by Morgan to Swords, or the execution of the notes and deeds and trust deed, until the notes were deposited in the bank in Wolfsborro, and not then until two of the notes were placed in his hands as collateral security. Swords now relies on a collateral agreement, made between himself and Morgan at the time the sale was made, that Swords might pay off any or all of

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these notes before they were due and thereby get a discount of eight per cent., and inasmuch as Morgan was going to New Hampshire it was agreed that the notes and trust deed should be left with Culver where Swords could go and pay them if he so desired.

This alleged agreement was made, if made at all, at the same time of the execution of the notes and mortgage, and was not put in either one of the instruments of writing. Morgan swears that no such agreement was made and that he did not make Culver his agent for collecting the notes, and that he took the notes with him to New Hampshire and never did leave them with Culver.

Swords swears there was such an agreement and that it was signed by Morgan, but that he did not sign it and did not read it.

Culver swears that it was in writing, and was assented to by both parties signing it. Suppose such an agreement had, in fact, been made and properly proven and in writing, it could not have bound appellant in any event without notice of its existence, even if it could with notice. It was no part of the notes nor the trust deed, and could in no manner change the terms of the note.

It was not assignable and could not go with the notes, nor could it hasten their maturity any more than it could extend the time of the payment. It can not be claimed with any show of reason or authority that negotiable promissory notes can be affected or incumbered with private independent agreements between the parties to them, such as is claimed in this case. *Rice v. Ragland*, 10 Humph. 545; S. C., 53 Am. Dec. 737.

If, by such an independent and separate agreement, the maturity of a note may be accelerated so as to bind assignees, then may the time of maturity be extended by like agreement. Nor would the agreement contended for here, that Morgan had appointed Culver his agent to collect these notes, be any more binding on an assignee for value, than an agreement to accelerate or extend the time of payment.

If that were so, it would be in the power of the payee of a

note to appoint an agent to receive payment of the note without reference to the holder or assignee of the note. All such agencies must terminate when the party making the appointments parts with his notes. The holder of promissory notes has the right to appoint his own agents to make collection.

But there is a total want of any credible proof that Avery ever heard of any such pretended agreement between Swords and Morgan. On the contrary, there is positive, reliable and uncontradicted proof that he never heard of any such pretended agreement, until he saw it in Culver's deposition. Morgan swears there was no such agreement, and that he never told Avery there was. Avery swears that he never heard of any such agreement between Morgan and Swords.

The only pretense that can be made to show that Culver was the agent of Avery, was that, when the first note was due, Avery sent it to Culver for collection for Morgan and at Morgan's request. That note did not belong to Avery, and he had no interest in it. When the other notes became due which he had bought from Morgan, he placed them both in National Banks near his home for collection, and paid no attention to Culver. The fact that these banks sent the notes, or one of them, to Culver for collection, did not make him the agent of Avery.

Without further prolonging the discussion of this branch of the case, we are satisfied that there is a total failure to prove notice of this pretended agreement to appoint Culver the agent of Morgan to receive this money or any part of it. The court erred in admitting the testimony relating to that agreement.

It was the duty of Swords before he paid this note, to have the note surrendered to him or to be sure that he was paying it to the right party. *Dutcher v. Beckwith*, 45 Ill. 460. He was bound to know that his note was assignable, and that the holder of to-day might not be to-morrow. It was an act of gross negligence on his part to pay the note without having it surrendered to him or being assured he was paying to the right party.

When he paid the note without receiving his note, he paid

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it at his peril. Avery did nothing to induce him to believe that Culver was his agent. Avery was in no fault. Swords acted in good faith, and supposed Culver would get his note from Morgan or Avery. Culver then knew that he had no authority from Avery to collect the money, for, by his own acts and correspondence, it is evident that he did not then know Avery owned the note, for he swears that when the money was paid, he gave Morgan credit with it on the books.

It is a familiar rule that when one of two innocent parties must suffer loss, that the one whose negligence has caused the loss must bear it.

We think the court erred in setting aside the order of another judge rendered at a previous term, denying a motion made by the defendant for leave to withdraw the general issue and file a special plea of payment. The case was first heard by the Hon. N. J. Pillsbury, and the defense was then given under the general issue.

Prior to the second trial, before the same judge, the defendant asked leave to withdraw the general issue and for leave to file a special plea of payment, which was very properly overruled by the court, and the defense was again made under the general issue on the second trial. On the third trial, before the Hon. Alfred Sample, judge, presiding, the defendant renewed his motion for leave to withdraw the general issue and file a special plea of payment, which motion was allowed, against the objection of the plaintiff.

There could be only one purpose in view in pressing this motion upon the court and in renewing it after it had once been refused, and that was to obtain an unjust advantage over the plaintiff in securing the opening and closing before the jury, an advantage which the defendant was not fairly entitled to. He could give evidence of payment just as well under the general issue as under the plea of payment, and hence we think the court, in the first instance, properly refused the motion. We hold that the allowance or refusal of the motion was, in the first instance, in the sound discretion of the court. We are not inclined to hold, as a matter of strict law, that the action of Judge Pillsbury in refusing the motion at one term pre-

cluded Judge Sample from vacating the order and changing it at a subsequent term, since the order was interlocutory only and relating to the formation of the issues in the case, but we think it is the exercise of such discretion as may be reviewed upon appeal, for abuse or improper exercise. We think in this case the order made by Judge Pillsbury was properly made, and that no sufficient reason was shown why another judge, at another term, should vacate it and make another order directly the reverse of it.

Under our present arrangement of judicial districts, throwing three judges together and making it necessary for them frequently to preside at different stages in the same case, we think great care should be observed and respect shown to the judicial acts of the several judges, and we think they should not set aside or interfere with each other's orders and judgments, even when they be only interlocutory and where the naked power exists so to do, unless there be some reasonable necessity for so doing, in order to promote the ends of justice or facilitate its due administration.

Any other rule is liable to promote unkind and unfriendly relations and lead to confusion and retaliation prejudicial to the administration of public justice. There being, as we have seen, no necessity of any kind for setting aside the order made by Judge Pillsbury, we think the court erred in allowing defendant to withdraw the general issue and file a plea of payment, and upon a retrial of the case the court will vacate the order allowing the plea of payment to be filed and the general issue to be withdrawn, and restore the pleadings as they stood on the first and second trials. If this was the only error in the case we should not regard it of sufficient gravity to justify a reversal for that reason alone.

Counsel for appellee contend that appellant waived his right to proceed against appellee by endeavoring to collect his claim from Culver in Kansas, after Culver had moved there, or that, if he did not, in fact, thereby waive his right to proceed against appellee, he at least furnished strong presumptive evidence that he regarded Culver as his agent and real debtor, and looked to him for his money. We do not look at Avery's

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conduct in attempting to get his money from Culver in that light. He knew that Swords had negligently and wrongfully paid the money to Culver which ought to have been paid to him, and that Culver had the money and ought to refund it. Culver was the culprit, cheating both Swords and Avery, and he ought not to be prejudiced in passing Swords long enough to see if he could get his money out of Culver and thus save Swords. He swears he never intended to release appellee unless he could get the money out of Culver.

It is insisted the court erred in refusing the first and second instructions asked for by the defendant. We think they were both properly refused. The first, because it omits all reference as to whether Culver was, in fact, the agent of Avery and so authorized to receive the money or not. It simply presents the question of the relative negligence of the parties. If Culver, in fact, had the authority from Avery to collect the money, then it could make no difference how much negligence Swords may have been guilty of in paying it without getting the note, or in paying it without any inquiry as to his agency.

The second instruction was properly refused because it singled out an important and single fact in the case and told the jury they might consider that fact. This mode of instruction has been so often condemned that it is barely necessary to call attention to it, and the court did right in refusing it.

For the errors above indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

WASHINGTON CORRINGTON
V.
HIRAM PIERCE.

Trespass—Boundary Line—Settlement by Survey—Breach of Agreement

The breach of an agreement, entered into by several adjacent land owners, to accept a boundary line as located by a surveyor, by one of them, does not destroy the obligations existing between the others.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Peoria County; the Hon. S. S. PAGE, Judge, presiding.

Mr. H. W. WELLS, for appellant.

Where two parties jointly enter into an agreement, and one of them, in the presence and with the knowledge of the other, does acts or makes statements to the party on the other side, affecting their agreement, that such acts or declarations will be taken as the statement of both unless some objections are made or some dissent is expressed.

In this case there were repeated acts and declarations of Cody, that he would not keep the agreement which he, with Pierce, had entered into. His suit in forcible entry and detainer was resumed and the trial had, in direct violation of the agreement, and Pierce was present and knew all about it, but no sign of dissent. Cody's subsequent settlement with Corrington was made, Pierce being present and directly told it did not include his land, and still no sign of dissent; two or three weeks later, November 9th, Corrington went and built his fence on the original line, and while this fence was being built he, for the first time, asked Corrington if he was not going to stand by that survey. Corrington replied, "No, you would not stand by it." That was the first time Pierce intimated his intention to abide by the contract to survey.

This is not a case where one of several parties attempts to set aside a contract in which others have an equal interest. This is a case where one, with the consent of all the others jointly interested with him, refuses to be bound by a contract, and the party on the other side acquiesces in that abandonment for more than four months after the contract was in effect abandoned. The suit, which was to be settled under the agreement, went to trial July 1st; from that time until November 9th, no one of the parties made any pretense that the contract had any binding force; all agreed, so far as declarations show, that it was abandoned.

We insist that the appellee is, by his acts, estopped to claim any rights under the agreement to survey. It seems that Corrington has acted entirely different from what he would have done, had it not been for the acts and declarations of Cody, and entirely different from what he would have done, had Pierce given any sign of dissent from Cody's acts and declarations.

He went on with his lawsuit against Cody—he subsequently made another and different settlement with Cody, he afterward hauled material and began to build a fence on the old line, and then for the first time Pierce spoke to him and asked him if he was not going to abide by the contract. During this four months, Corrington, in good faith, and not suspecting any concealment on the part of Pierce, acted as though Pierce had agreed with Cody to abandon the survey.

The law of estoppel is stated in the following cases: *Knobel v. Kircher*, 33 Ill. 308; *Kinner v. Markey*, 85 Ill. 96; *Smith v. Newton*, 38 Ill. 230.

MR. ARTHUR KEITHLEY, for appellee.

Where a matter has been submitted to arbitrators by one on one side, and by two on the other, for an award, can one of the two, without consent of the other, either revoke the submission or after the award destroy its effect? *Kyd on Awards*, 30; *Robertson v. McNeil*, 12 Wend. 578.

It is the policy of the law to recognize and sustain boundaries established by agreement of the parties and to apply the doctrine of estoppel where the law and the justice of the case will warrant. *McNamara v. Seaton*, 82 Ill. 498.

C. B. SMITH, J. This was an action in trespass begun before a justice of the peace by appellee against appellant, for throwing down a fence erected by Pierce on land Corrington claimed to own. The plaintiff, Pierce, recovered a judgment for \$25 before the justice, and Corrington appealed to the Circuit Court, where the plaintiff again recovered a judgment for \$25, and Corrington brings the case to this court on appeal. The facts out of which this controversy grows are these:

Corrington owned eighty-five acres of land in section 28. Pierce owned several lots abutting Corrington's land on the east, and one Joseph Cody also owned one lot south of Pierce's lots, and also abutting Corrington's land. The same line which divided Corrington's and Pierce's land also divided Corrington's and Cody's land. Before the controversy between Pierce and Corrington began, it appears that Cody put his fence over on what Corrington claimed was his land, and thereupon Corrington sued Cody in forcible entry and detainer before a justice of the peace. At the time set for the trial of this case, a verbal agreement was made between Corrington on the one side, and Pierce and Cody on the other, that the dispute about the line should be settled by surveyors to be chosen by the parties, and that the surveyors should go on the land and survey it and locate the disputed line and that all three of the parties should be bound by the line as located by the surveyors. To accomplish this end the suit between Corrington and Cody was continued until after the survey should be made. The surveyors were selected and made the survey and located the line in pursuance of this agreement. After the line was thus located, Cody repudiated his agreement and refused to abide by the line located by the surveyors. Pierce was present and heard Cody refuse to abide by his agreement and was also present at the trial between the parties afterward, but took no part in the first conversation when Cody said he would not stand by the survey; nor did he take any part in the subsequent trial between Cody and Corrington. Shortly after the survey and after the trial between Corrington and Cody, Pierce informed Corrington that he was abiding by the survey and expected him, Corrington, to do the same thing and that he would build his fence on the line established by the surveyors, which he did in a short time, but not putting his fence as far, by an inch or so, as the line authorized him to do. Corrington thereupon tore down the fence placed there by Pierce. Corrington now contends that, inasmuch as Cody refused to stand by his agreement with the knowledge of Pierce, Pierce must also be held as repudiating it, and that he is therefore also released from any obligations under this con-

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tract to Pierce. We can not concur in this view. Cody and Pierce had no joint interest in the line, nor in the lands abutting the line. Their interest in the line and land were several and entirely distinct, and we think each one of the parties were separately bound by their agreement and that neither one could destroy the obligations existing between the others without their consent. If they had been jointly interested in the land, it might be that the act of one would then bind the others. The authorities cited by appellant are unlike the case at bar, and can have no application to this case. The court instructed the jury in harmony with the views herein expressed.

There is no error in the record and the judgment is affirmed.

Judgment affirmed.

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V.

AVERY G. CASE.

Sales—Conditional Sale—Furnace—Evidence—Instructions.

1. In an action to recover the purchase price of a furnace, it is *held*: That the questions whether the contract was an absolute or conditional one, and whether the furnace properly heated the house, were fairly submitted to the jury; and that there is no such conflict between the evidence and the verdict as to require a reversal.

2. The purchaser of a chattel, the contract being conditional upon its answering the purpose for which it was designed to the satisfaction of the vendee, must, within a reasonable time, if it proves unsatisfactory, so notify the vendor.

3. Testimony as to the value of a given article by a person who is not shown to have any knowledge thereof, is inadmissible.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

Mr. CHARLES WHEATON, for appellant.

There was a warranty by appellee that the furnace would work well and heat the rooms in appellant's house that had been piped. - It was not necessary that the word warrant should have been used. Any positive representation of the quality of an article or any positive representation that it will answer the purpose for which it is designed, amounts to a warranty. Any positive representation made at the time of the sale, by the seller, for the purpose of inducing the buyer to purchase, is a warranty. *Hawkins v. Berry*, 5 Gilm. 36. When a representation is positive and relates to a matter of fact it constitutes a warranty. *Sparling v. Marks*, 86 Ill. 125; *Robinson v. Harvey*, 82 Ill. 58.

The theory of appellant was, that the agreement between him and appellee was, that appellee should put a furnace in his house and unless it worked to his satisfaction, appellee would put it in and take it out without any expense to appellant. If such was the agreement, then the law is, that whether the furnace was satisfactory or not was to be determined alone by appellant, and whether it worked well or not was immaterial. *Goodrich v. Van Nortwick*, 43 Ill. 445.

And the mere fact that appellant did not, within a reasonable time, notify the plaintiff that the furnace did not suit, would not of itself, as a proposition of law, enable the plaintiff to recover, nor authorize a recovery of the contract price. The fact he did not give notice would only raise a presumption against appellant that the furnace did suit.

The not giving notice was a matter that affected only the *quantum* of evidence in proving that the furnace did not suit. It was a mere fact to go to the jury to be considered by them in determining the question as to what the agreement really was and whether the furnace did suit. And it was an error to instruct the jury, as was done substantially in this case, that if appellant did not give the notice he had no defense.

The cases of *Shields v. Reibe*, 9 Ill. App. 598; *Fielder v. Starkin*, III Bl. 17; *Bordman v. Johnston*, 12 Wend. 556; *Thornton v. Wynn*, 12 Wheat. 183, and *Poulton v. Latimore*,

9 Barn. & C. 259, fully establish the doctrine that the not giving the notice only affects the question of fact as to whether the goods had the defect complained of, and only raises the presumption against the buyer that they had not.

In the case of *Shields v. Reibe, supra*, it is expressly held that an instruction which tells the jury that it is the duty of the defendant to give the plaintiff timely and reasonable notice of the defect complained of is erroneous. The decision in that respect is in accordance with the weight of authority and is the law.

Messrs. HOPKINS, ALDRICH & THATCHER, for appellee.

C. B. SMITH, J. It appears from the evidence in this case that appellee was a dealer in hot air heaters or furnaces called the Boston Peerless, and that appellant, who had recently built a new house, negotiated with appellee to have a furnace placed in his house. Appellee had a new furnace called the Western Peerless which he supposed to be an improvement on the Boston Peerless and sold that one to appellant. Shortly after this, appellant made some complaint that the Western Peerless would not work, and appellee then informed him that he had put in three other Western Peerless furnaces and that they were not working satisfactorily and that he would take them all out at his own expense and replace them with his regular Boston Peerless. Appellant made no objection to the change, and it was made accordingly. The new or second furnace was placed in the house in September or October, 1885. This suit is now brought to recover the price of the heater. The principal controversy grows out of the terms of the contract. Appellant testifies that the contract was a conditional one; that appellee agreed to put in the furnace for \$176, on the express condition that it should suit appellant; that the furnace was to remain the property of appellee, unless it suited appellant, and that, if it did not suit him, it was to be put in and taken out without a cent of cost to him. No time was fixed for payment. This was the contract as stated by appellant.

Appellee swears that they had had frequent conversations about the furnace, and that appellant knew what furnace it was and asked him for his lowest figures, and that he gave him \$176 as the lowest price, and that appellant then replied: "Go ahead and put in the furnace and I will take it." Appellee testifies that the sale was an absolute one and that there were no conditions to it. Nothing was said about when the furnace should be paid for. Appellant testifies that the furnace did not work well, and that it leaked gas and did not heat his house well, and that he made frequent complaint to appellee about the defective working of the furnace. Appellee denies that any complaint was ever made to him about the furnace until more than a year after the furnace was put in, and only after he had sent his bill for the furnace. On the trial evidence was submitted on both sides as to the sufficiency of the furnace to heat the house, and showed more or less conflict. The trial resulted in a verdict for appellee for the full amount of his claim, \$176.

A motion for a new trial was made and overruled, and judgment entered on the verdict. Appellant brings the case here for review, and urges that the verdict is against the evidence, and that the court erred in giving and refusing instructions, and in rejecting proper testimony offered by appellant.

As to whether the contract was an absolute or conditional one, and as to whether the heater properly heated the house, we have only to say they were both questions of fact, fairly submitted to the jury, and we see no such conflict between the verdict and the evidence as would justify us in setting aside the verdict for that reason. On the contrary, we think the evidence supports the verdict. The case has already been twice tried, and two juries have found the same way. We see no reason to believe that another jury would find differently.

The following instruction was asked by appellant on the trial in the court below, and given as modified by the italics:

"If the jury believe from the evidence that the agreement of the parties in this case was, that the plaintiff should put a furnace in the dwelling house of the defendant, and that unless it worked to the satisfaction of the defendant, that he,

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the plaintiff, would put it in and take it out and away without any expense to the defendant; and if the jury further find from the evidence that the defendant was not satisfied with said furnace, then they, the jury, should find for the defendant, notwithstanding they should find from the evidence that the furnace did work well; the law being, that, if by agreement of the parties, the furnace would be satisfactory to the defendant or not, then whether satisfactory or not, was to be determined alone by the defendant, and whether or not it worked well is wholly immaterial. *But the court further instructs you that if the furnace was not satisfactory to the defendant, and if no particular time was agreed upon in which the plaintiff should take it away, then it was the duty of the defendant to notify the plaintiff within a reasonable time that the furnace did not suit, and if the jury believe from the evidence that he did not do so, he could not subsequently complain that it did not satisfy him.*"

Counsel for appellant informs us that the above instruction as asked, without the italics, "is in harmony with the decision of the court in the case of Goodrich v. Van Nortwick, 43 Ill. 445." A reference to that case fails to show any such instruction. Nor does the case itself support any such doctrine as contained in the instruction upon a similar state of facts. The instruction was wrong and misleading on appellant's own theory of the case; conceding the contract was a conditional one, and that appellant was not bound to keep the heater unless it suited him, it was plainly his duty to exercise his election within a reasonable time, and, if the heater was not satisfactory, to notify appellee and give him an opportunity to remove it. The parties resided in the same town and it is in proof that appellant kept the heater nearly, if not quite, a whole year before he informed the appellee that he would not keep it, and used it to heat his house during the fall, winter and spring of 1885-86.

Appellant contends that the case of Shields v. Reibe, 9 Ill. App. 593, is an authority in support of the instruction. That was a suit brought for ten bags of choice Virginia shelled peanuts, sold by sample, and to be delivered in Chicago at an

agreed time. Shortly after the bags arrived at Chicago the purchaser took them to his store without examination and placed them in a dry place. In eight or ten days the peanuts were examined and found to be partly rotten and all spoiled and worthless. Immediately upon the discovery of the condition of the goods the purchaser notified the seller of their condition and refused to pay for them. Upon these facts the court say: "That the plaintiff was not entitled to recover the price, for the reason that the contract was merely executory and for the sale of goods of a particular description and when delivered they were not of that description, and *reasonable notice was given by the buyer to the seller of such fact.*" The defendant pleaded two pleas: First, the general issue, and second, a plea of failure of consideration. On the trial the court in substance instructed the jury that on a sale of goods by sample the seller is entitled to a reasonable notice of any defect in the goods, and that it is the duty of the purchaser to give reasonable and timely notice, that the goods are not equal in quality to the sample. The notice was given promptly of the bad condition of the peanuts as required by the instruction, and there was no contention about his failure to give the notice; it was conceded by both parties. The defendant certainly put himself in no worse condition by giving such notice, and if no notice was necessary he was not in a position to complain of the action of the court in telling the jury that it was his duty to do just what he did do—give the notice. The court say that, "as the issues were, the giving of this instruction was erroneous. As the issues stood the verdict allowing plaintiff full price for his goods was manifestly against the weight of the evidence." The issues in that case and this one were different. In this case only the general issue was pleaded. We do not understand that case as holding that the purchaser of a chattel may make a conditional purchase depending on his election to make it absolute, and that he can then never be required to exercise such election and keep the chattel indefinitely without paying for it. We think no authority can be found in support of such a proposition.

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Appellant knew how the heater was working and if it did not suit him and he did not intend to keep it and pay for it, it was his duty to notify appellee of that fact within a reasonable time, under his claim of right to reject it if not satisfactory. To now allow him to keep it and use it with the secret intention of not paying for it would be to sanction a gross and palpable fraud. And yet this was what the instruction as asked told the jury appellant might do. The instruction as modified by the court was correct, but erroneous without the modification.

The instruction given on motion of appellee, about which complaint is made, announces the same rule as laid down in the modification of the court to the one above set out, and announces a correct rule of law.

Appellant complains that the court erred in sustaining objections to certain questions asked of one of the witnesses relating to the fair market value of a Western Peerless furnace and of a Boston Peerless furnace in 1885. There was no error in this. There was no evidence to show that the witness had any knowledge of the value of the kind of furnace named, nor did the question relate to the furnace in controversy, nor to one of the same size as the one in controversy.

We have examined this record carefully and can find no such error as would justify a reversal of the judgment, and it is affirmed.

Judgment affirmed.

GEORGE BALL

V.

HENRY BALLENSEIFEN.

Negotiable Instruments—Note—Failure of Consideration—Pleadings and Proof—Variance—Instructions.

In an action on a promissory note, given in payment for land to which

the title has failed, and accepted, when so given, by the plaintiff for an indebtedness due himself from the grantor of the land, it is *held*: That there is no variance between the pleadings and proofs; that the verdict for the defendant is sustained by the evidence; and that there is no error in the instructions.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Marshall County; the Hon. N. W. GREEN, Judge, presiding.

Messrs. E. J. RIELY and BARNES & BARNES, for appellant.

Messrs. EDWARDS & EVANS, for appellee.

C. B. SMITH, J. This was a suit on a promissory note, brought by appellant against appellee. The declaration was in assumpsit. The defendant filed two special pleas of failure of consideration, upon which issue was joined. The facts out of which this controversy arose are these, as disclosed by the record:

At the date of the note sued on, one Michael Louis had the title in his own name to the northeast quarter of the northeast quarter of section nine, town thirty, range two. It also appears that Michael Louis was indebted to appellant in the sum of \$300 on a note which Ball wanted paid. Appellee testifies that Ball approached him three or four times and wanted to sell him the land, and claimed the land as his own, but said he himself could not make the deed, but that he would get Michael Louis to make the deed, and that he finally consented to buy it for \$360 on condition that Ball would give him time, which Ball said he would do.

Afterward, Michael Louis, George Ball, the appellant, and appellee, Ballenseifen, and one Perley, an attorney at law, came together to close up the transaction with deeds, notes and mortgage to secure the purchase money.

The deed was made by Louis and his wife to Ballenseifen, and thereupon Ballenseifen executed one note for \$300 to appellant and one note of \$60 to Mrs. Louis, these two notes being for the full amount of the purchase money.

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Ballenseifen and Perley both swear that this \$300 note was made and delivered to appellant at his own and Michael Louis' request, and to be taken in lieu of the \$300 claim appellant had against Louis.

There is no denial of the fact that the only consideration of this note was the conveyance of the land and its covenants of warranty of title to appellee, and that appellant knew that fact when he took the note. Appellant denies that he procured the sale of the land or had anything to do with its negotiation. In the view we take of the case it is not very important whether he did or not. He was present when the trade was completed, and took, at his own request, the consideration for the land, and he was not then, and has not been since, an innocent holder of the note for value received without notice. At the time the deed was made there was an unpaid judgment against Michael Louis which was then a valid lien against this land, and upon which an execution was afterward issued and levied on the land and the land sold, and a deed afterward in due time made to the purchaser, whereby the title became lost to the appellee, and the consideration of both notes wholly failed.

These facts were properly pleaded, and not denied in the replications. A trial resulted in favor of the defendant below, and he had a judgment for costs. Appellant brings the case here for review, and assigns for error that the verdict and judgment are against the evidence, and that the court erred in permitting the defendant to make his defense under the pleas, alleging a variance between the proof and the pleas.

Appellant insists that because appellee testified that he made the bargain with Ball for the purchase of the land, that it does not support his pleas, both which are that he purchased the land of Michael Louis. We do not think this objection well taken. The pleas properly averred the purchase to be from the party who held the title and made the deed, and the mere fact that Ball may have brought the parties together and arranged the terms of the sale in no correct legal sense made him the seller. There was no variance between the proof and the pleas. We also think the evidence sustains the verdict.

The jury were justified in finding from the evidence that Ball, the appellant, was the originator of this trade, and that he induced appellee to make the purchase for his (appellant's) own benefit, and, if that be so, then he must be chargeable with notice of the infirmity of the title he induced appellee to buy, and especially so when he takes the benefits arising from the transaction. The case is not like one acting as the mere agent of another, selling for a commission without other interest in the transaction.

Appellant also insists that the court erred in giving and refusing instructions. We have examined the instructions in the light of the pleading and evidence, and are of opinion the court properly instructed the jury, and that the instructions are not open to the objections urged against them.

Finding no error in the record the judgment is affirmed.

Judgment affirmed.

WILBUR H. SMITH

V.

MARTIN & OESTERLE, USE, ETC.

Sales—Joint Liability—New Promise—Parties—Amendment.

1. This court affirms a judgment for a balance on account of goods sold, on the ground that the defendant was jointly liable with another, and that the evidence shows a new promise within five years to pay the balance due.

2. A new party plaintiff may be joined with the original plaintiff, upon an appeal from a justice, after trial has begun in the Circuit Court.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding.

Messrs. FITHIAN & COWING, for appellant.

Mr. E. MEERS, for appellees.

Smith v. Martin & Oesterle.

C. B. SMITH, J. This is an appeal from the Circuit Court of Will county, from a judgment rendered against appellant for the sum of \$11.25. It was brought to the Circuit Court on appeal from a justice of the peace.

It appears from this record that certain employes of the C., P. & S. W. R. R. Co. desired to make a present to the superintendent and auditor of the road, and a fund was subscribed for that purpose, and paid to one Morton, the chief clerk in the auditor's office, who was also appointed to buy the presents. The appellant was one of the subscribers to the fund. He also appears to have taken some part in buying the presents of appellees; appellees claim and testify that the goods were sold to Morton and Smith and delivered to them, and charged to them on the books. Appellant denies this. There was paid on the delivery of the goods \$84.50. Some time afterward \$25 more was paid. Morton then left and paid nothing more on the bill until in 1883. There is testimony tending to prove that appellant promised appellee that if Morton would pay one-half the balance, he would pay the other half.

We think the court was justified in finding that appellant was a joint purchaser of these goods, and jointly liable with Morton. We think also that the proof showed a new promise on the part of appellant within five years to pay the balance of the account.

It is urged that the court erred in permitting a new party plaintiff to be joined with the original plaintiff before the justice on appeal, and after the trial had begun and evidence heard in the Circuit Court. There was no error in this. *McDowell v. Town*, 90 Ill. 359.

Judgment affirmed.

JOHN R. ZIEGLER

V.

STUDEBAKER BROTHERS MANUFACTURING COMPANY.

Sales—Refusal to Accept—Question for Jury—Damages.

In an action to recover damages for the refusal of the defendant to accept certain carriages and harness, sold and delivered to him under a written contract, it is *held*: That the verdict for the plaintiff is sustained by the evidence; and that the trial court did not err in entering a judgment on the same, and in refusing a motion for a new trial.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Mr. H. W. WELLS, for appellant.

Messrs. IRWIN & SLEMMONS, for appellee.

UPTON, J. This was an action in assumpsit brought by appellee against appellant to the October term of the Circuit Court of Peoria County, 1887, for damages for failing to accept and pay for two coaches and one set of coach harness, sold and delivered, as alleged, by appellee to the appellant in the spring of 1887.

The declaration contained three special, and the common counts. The first special count is for the alleged purchase price of two certain coaches and one set of coach harness sold and delivered; second count for the price of two certain coaches and one set of coach harness bargained and sold and the third count was for damages in failing and refusing to accept and settle for the same coaches and harness sold and delivered by appellees to appellant.

The pleas were the general issue, *nul tiel corporation* and set-off. Issue was joined on the first and second pleas, and two

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special replications were filed to the third plea of set-off, setting forth that the plaintiff did keep and perform its contract, and that it was not indebted to the appellant as alleged in said plea.

The case was heard before the court below and a jury and to maintain the issues joined the plaintiff offered and read in evidence the following contract in writing, viz.:

“CHICAGO, February 21, 1887.”

“STUDEBAKER BROS. MFG. CO., South Bend, Indiana.

“*Gentlemen:* Please ship me on or about April 1, 1887, the two following coaches: one falling front and one stiff top coach, both to be trimmed in dark green cloth, to be painted dark green, gear and body, with black stripe, and one set of black mounted coach harness to go with the above jobs, for which I agree to pay two thousand two hundred dollars (\$2,200), about one-half cash on receipt of goods, balance inside of one year with secured notes, with interest at seven per cent.”

“JOHN R. ZIEGLER, Peoria, Ills.”

“Ship C., R. I. & P.”

The coach harness mentioned in the above contract, about which there is no contention, was shipped to appellant by his express direction, some time prior to the 1st of April, 1887, and upon receipt thereof was accepted and at once put in use by appellant.

The coaches were shipped some time after the 1st of April, 1887, at the like special request of appellant by letter to appellees under date of March 28, 1887, in which the appellant says:

“As the weather has held me back and there is no especial hurry for the carriages, I would rather not have them shipped in this storm. You had better hold them a day or two for good weather.” The coaches were shipped to and received by the appellant on or before the 15th of April, 1887.

It will be noticed that the written contract did not particularly describe the coaches or harness sold, and evidence on this point was heard on the trial in the court below. It appears that appellees had their carriage warehouse in the city of Chi-

cago, and the appellant resided and was engaged in business as an undertaker in the city of Peoria, Illinois. Appellant went to Chicago to appellees' warehouse with the view to purchase there, or elsewhere, two coaches for his business. He was shown one of the coaches in question, at least which he insists was to have been the sample of both, except that the one was to be what was called a 'stiff top, and the other a let down front; in other respects, trimming and general appearance, they were to be alike. Appellant admits that one of the coaches sent him was the same shown and sold him, but insists the other was in no respects like it, that its interior was moth-eaten and damaged, the lamps mounted upon the body instead of the sides of the coach, and that for such and other defects he refused to accept such other coach, but was willing to accept the one, and the set of double harness.

The appellees insist that the coaches delivered were in all respects up to, and were, in fact, the same coaches shown and sold to appellant, and the same coaches referred to in the contract, and were in no particular defective as claimed by appellant. No complaint is made of the harness not being up to the contract.

From this contention some correspondence ensued between the parties. At appellant's request, the agent of appellee went to Peoria to adjust, if possible, the controversy, but not succeeding, the appellant, about the 26th of April, 1887, re-shipped to appellees at Chicago the two coaches and the set of harness, where the same soon after arrived and were delivered to the appellees.

The appellees claimed damages for the non-acceptance of the coaches and harness, in accord with the written contract, of \$500 and \$100 in cleaning and re-varnishing the coaches, \$25 damages on re-sale of the set of harness, \$26 for expense of agent's trip to Peoria, and about \$28 for freight on re-shipment of coaches from Peoria to Chicago, paid by appellees. Appellant to this interposed a counter-claim for damages to him for the alleged non-fulfillment of the contract, in not sending the coaches as ordered and sold to him, for the loss of business and for expense and keep of help and horses, of more than sufficient to meet the claim of the appellee.

Failing to adjust this controversy, this suit was brought in the court below as stated. After hearing the evidence and instructions of the court the jury rendered a verdict for the plaintiff in the sum of \$25, upon which the trial court, after overruling a motion for a new trial, entered judgment, and to reverse which the appellant brings the case to this court and assigns for error in the trial court, in substance, the overruling of the motion of appellant for a new trial, and in rendering a judgment for appellee on the verdict of the jury.

Other errors were assigned, viz.: The admissions of improper evidence, but no such evidence is pointed out and we fail to perceive any such in the record. The refusal of proper evidence offered on the part of appellant, and it is said upon this point that an offer was made to show that the set of harness was of less value than \$150, which the court excluded, and, as we think, very properly. It was not claimed that the harness was not up to the contract, when received; indeed, the appellant had in fact accepted it and put it to use some time before the contention concerning the coach arose, and when accepted its value became wholly immaterial in this controversy.

No objection is pointed out to the instructions of the court which were given or refused, and none is perceived.

This contention was purely one of fact, and within the peculiar province of the jury. Upon the issues joined in this case, the jury have found for the appellees, and hence the appellant could have no claim for any damages for a breach of the contract, as the jury found there was no breach. If the coaches and harness delivered to appellant were the ones purchased by him, as the jury have found, it must be that not only has he no claim for damages in returning the goods to the appellee and refusing to comply with his contract, but he ought to respond in damages sufficient to compensate appellee for all loss occasioned thereby.

It is shown beyond cavil that the harness had been put to use by the appellant, and that the same was damaged for re-sale by such use at least \$25, the amount of the verdict.

We have carefully examined this record and the entire evidence and we can not say the jury was not warranted thereby

in finding the verdict they did. Indeed, under the evidence, their verdict in our judgment might have been sustained for a much larger sum, but the appellee is not objecting, nor has it assigned cross-errors. The trial court was not in error in refusing the motion for a new trial and entering judgment on the verdict, and finding no error in this cause in the proceedings in the court below, the judgment must be affirmed.

Judgment affirmed.

JAMES COMMON

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Bastardy—Paternity of Child—Continuance—New Trial—Evidence.

In a bastardy proceeding, it is *held*: That the defendant showed due diligence in endeavoring to procure the testimony of important witnesses, and failing in this was entitled to a continuance; and that under the facts, the record and the circumstances shown, his motion for a new trial should have been granted.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Iroquois County; the Hon. ALFRED SAMPLE, Judge, presiding.

This was a bastardy proceeding, commenced before a justice of the peace by complaint in writing of Carrie Winkle. The appellant was bound over to the County Court, where a trial was had resulting in a judgment of guilty against appellant, who then appealed to the Circuit Court, where a like judgment was obtained, and appellant brings the case to this court by appeal, and assigns for error, the overruling of appellant's motion for a continuance of said cause and the overruling appellant's motion for a new trial.

Various other errors were assigned which, in the view we take of this case, will not be necessary for us to notice. The

complaint on which appellant was arrested was made October 21, 1886. The complaining witness, Carrie Winkle, gave birth to the bastard child February 26, 1887. The principal controversy in the case was as to the paternity of the child.

The complaining witness, Carrie Winkle, testified that appellant was the father; and this was the only evidence to support the charge and her testimony was unsupported by any material corroborating circumstances in evidence in the case.

There was, on the contrary, considerable evidence tending to show that she had made contradictory statements on material points in issue in the case.

The appellant positively denied that he ever had sexual intercourse with the complaining witness at any time. She testified in her cross-examination that she never spoke to appellant about her condition, or charged him with the paternity of her child, although residing in the same family, until the day before complaint was made before the justice, October 21, 1886.

She further testified that she first spoke of her condition to Richard Heisler, and that he went with her to see appellant to charge him with its paternity, the day before making the complaint.

Mrs. Brumback testified that Carrie Winkle lived in her family as a servant, and on several occasions went to the house of Richard Heisler, and upon several occasions she told Mrs. Brumback and her mother, "that if she had not been a good girl her and Mr. Heisler would have done wrong; that was the sum and substance of what she said;" the last time she so stated was the latter part of October, 1885.

David Brumback, Almon Brumback and Mrs. Brumback, all testify that both appellant and complaining witness lived in their family for a year and more, and during the time when it is charged the child was begotten were servants, the appellant employed at work on the farm and the complaining witness as a domestic in the house of the Brumbacks; that they never saw any exhibition of familiarity of any kind between appellant and Miss Winkle while there.

The complaining witness further testified that Richard

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Heisler went with her to see Dr. Smith before the arrest of appellant, and that she was then "doctoring" and that she knew what she was "doctoring" for. She further testified that she went to Mrs. Wright's to be "doctored" also.

We have here briefly alluded to some of the evidence in this case, bearing, as we think, upon the materiality of the absent witnesses and the facts sought to be established by them, as set forth in the affidavit for a continuance, which was refused in the court below, and which is here assigned for error.

Prior to the calling of this case for trial the defendant moved the court below for a continuance of this cause, and in support of said motion the following affidavits were read and filed in the trial court:

"STATE OF ILLINOIS, }
Iroquois County. } ss. In the Circuit Court, to the
March Term, A. D. 1888.

The People of the State of Illinois }
vs. }
James Common.

"James Common being duly sworn, upon his oath says: That he is the defendant in the above entitled cause. That he can not safely proceed with the trial of said cause at the present term of this court, on account of the absence of a material witness, whose attendance he has been unable to procure at this term. Affiant says that the said witness, whose attendance he desires, is one Charlotte Wright, who lives in the city of Gilman, in said county and State. That the said Charlotte Wright would, if present, testify that the prosecuting witness told her, the said Charlotte Wright, that one Richard Heisler was the father of her child; that the said prosecutrix told her this during the time of her pregnancy and before the said child was born; that in this suit the prosecutrix claims that this defendant, and not the said Heisler, is the father of said child.

"Affiant says that he knows of no other witness by whom he can prove any such statement or admission of the prosecutrix. Affiant further says that on Friday, the 23d day of

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March, he went to the home of said Charlotte Wright in Gilman with a subpoena for the purpose of summoning the said Charlotte as a witness in the above entitled cause; that said Charlotte's husband told affiant that said Charlotte was not at home. Affiant says that he was at said Charlotte's home three different times on said day and could not find said Charlotte at any of said times. Affiant says he verily believes that said Charlotte Wright was concealing herself for the purpose of avoiding service of said subpoena. Affiant says said witness is not absent through or by any procurement or consent of this affiant, and that this affiant believes he can procure said witness' attendance at the next term of this court, and affiant says that this application is not made for the purpose of delay but that justice may be done. Affiant further says that Mrs. C. Heyers was also duly subpoenaed to appear in this cause this day, and is not in court nor in the city of Watseka, and affiant says that he believes, but does not know for a certainty, that Mrs. C. Heyers will testify to the same admissions made by prosecutrix to her as set out above and made by prosecutrix to said Wright, and that she is not absent by procurement of defendant.

"JAMES COMMON.

"Subscribed and sworn to before me this 26th day of March, A. D. 1888.

"JOHN FRITH, Clerk."

Which said affidavit is indorsed as follows:

"People v. Common. Affidavit James Common. Filed March 26, 1888.

"JOHN FRITH, Circuit Clerk."

"STATE OF ILLINOIS, }
Iroquois County. } ss. In the Circuit Court, to the
March term, 1888.

"The People of the State of Illinois }
vs. }
James Common.

"D. Brumback being duly sworn, upon his oath says: That on the 24th day of March, A. D. 1888, he went to the house of the said Charlotte Wright with a subpoena for her as a

witness in the above entitled cause. That he was unable to find said Charlotte Wright, but verily believes from what said Charlotte's husband told him that said Charlotte was then at home, but was in concealment to avoid the service of process upon her as a witness in said cause. Affiant says that the said Charlotte told affiant that the prosecutrix had told her Richard Heisler was the father of the child in controversy in this suit.

“DAVID BRUMBACK.

“Subscribed and sworn to this 26th day of March, 1888.

“JOHN FRITH, Clerk.”

Which said affidavit is indorsed as follows:

“People v. Common. Affidavit of Brumback. Filed March 26, 1888.

“JOHN FRITH, Circuit Clerk.”

“STATE OF ILLINOIS, }
Iroquois County. } ss. In the Circuit Court, to the
March term, 1888.

“The People of the State of Illinois }
vs. }
James Common. }

“Charles H. Payson being duly sworn, upon his oath says: That a short time before the commencing of this court for this term, he had a conversation with Mrs. Charlotte Wright in the city of Gilman; that in said conversation the said Charlotte Wright told affiant that the prosecutrix in the above entitled cause had stated to her that one Richard Heisler was the father of a child with which the prosecutrix was pregnant; that said child is the same child of whom the defendant in the above cause, is charged to be the father. Affiant says that the said Charlotte Wright said she did not want to be a witness for personal reasons. And affiant further says that on Saturday of last week he went to the city of Gilman where said Charlotte Wright resides, with a subpoena to summon said Charlotte as a witness in the above entitled cause.

“That he went to the home of said Charlotte Wright and was informed by the husband of said Charlotte that said Charlotte Wright was not at home, and that he did not know

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where she was or when she would return. Affiant says he verily believes that said Charlotte Wright was at that time at her said home, and that she was keeping herself in concealment for the purpose of evading the service of a subpoena upon her. Affiant further says that he left said subpoena with one J. V. Milsted, a constable in said city of Gilman, with instructions to carefully watch for said Charlotte Wright and serve said subpoena if possible, and affiant says that the subpoena hereto attached is the one left by affiant with said Milsted.

“CHAS. H. PAYSON.

“Subscribed and sworn to this 26th day of March, 1888.

“JOHN FRITH, Clerk.”

To which affidavit is attached the following subpoena:

“STATE OF ILLINOIS, }
Iroquois County. } ss. To the Sheriff of said county,
Greeting:

In the name of the People of the State of Illinois.

“We command you to summon Mrs. Dr. Wright, Jacob Eppelsheimer, Mrs. C. Hyers, to appear before the Circuit Court of said county, at the court house in the city of Watseka, in said county, on the 26th day of March, 1888, at 2 o'clock P. M., to testify and the truth to speak in behalf of defendant in a cause now pending in said court, wherein the people are plaintiffs and Common defendant. And have you then and there this writ, with a return thereon, showing in what manner you have executed the same.

“Witness the hand of the clerk of said Circuit Court and the seal thereof at his office in Watseka, in said Iroquois county, this 21st day of March, A. D. 1888.

“JOHN FRITH, Clerk.”

Which said subpoena is indorsed as follows:

“STATE OF ILLINOIS, }
Iroquois County. } ss. J. V. Milsted being duly sworn, upon oath says: That he served the within writ upon the within named by personally reading the same to the said Mrs. C. Hyers, Jacob Eppelsheimer, Mrs. Dr. Wright not found, this ——— day of March, A. D. 1888.

“J. V. MILSTED.

"Subscribed and sworn to before me this 26th day of March, 1888.

"ISAAC BEYEA, J. P."

Which affidavit is indorsed as follows:

"People v. Common. Affidavit of Chas. H. Payson. Filed March 26, 1888.

"JOHN FRITH, Circuit Clerk."

But the court overruled defendant's motion for a continuance, to which ruling defendant excepted.

Messrs. PAYSON & RAYMOND, for appellant.

Messrs. R. W. HILSCHER, State's Attorney, and F. P. MORRIS for appellees.

UPTON, J. We think the appellant showed due diligence in his endeavor to procure the testimony of the witnesses, in the affidavit named for the trial, and that the trial court should have granted appellant's motion for a continuance, or compelled appellee to have admitted the affidavits under the statute. The evidence in our judgment was very material and could not have failed to have had an important influence with the jury on the trial of the cause.

Under the facts in this record and circumstances shown, we think the trial court should have granted appellant's motion for a new trial of the cause, and for these reasons, the judgment of the Circuit Court is reversed and the cause remanded for further proceedings.

Reversed and remanded.

C. B. SMITH, J., dissenting. I can not agree with the majority of the court. I do not think the affidavit in this case shows any reasonable or sufficient diligence in procuring the presence of the absent witnesses, and I think the court ruled correctly in overruling the motion.

Cleary v. Cummings.

THOMAS CLEARY
v.
ROBERT F. CUMMINGS.

Judgment Note—Instruction—New Trial.

1. There is no error in refusing to give an instruction which has no basis in the evidence.
2. A refusal to grant a new trial on the ground of newly discovered evidence is proper when the same is merely cumulative and not conclusive.

[Opinion filed December 8, 1888.]

IN ERROR to the Circuit Court of Iroquois County; the
Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. HARRY BROTHERS, for plaintiff in error.

No appearance for defendant in error.

LACEY, P. J. This suit was based on a promissory note which purported to have been given by appellant to appellee, dated April 13, 1880, for two sums of money mentioned in the note (for \$87.50 and \$9.60) with interest at eight per cent. The appellant pleaded the general issue and *non est factum*, sworn to. The result of the trial was a verdict and judgment in favor of appellee for the amount of the note and interest. The note was a common judgment note. The appellant assigns for error the refusal by the court to give his instructions. 1st. That if appellee told the defendant to sign the note and read a promissory note to him, and he did so, and it turned out to be a judgment note, then the note would not be the note of appellant. 2d. If appellee read the note to appellant before signing and it was only a common promissory note as read, then, if the note were different and a judgment note, there could be no recovery. It was not

improper to refuse these instructions. For anything the instructions stated, the appellant may have been perfectly aware of the kind of a note he was signing, or might have so known. Secondly, the appellant did not, in his testimony, base his defense on such grounds.

He positively swears that he did not authorize appellee to sign the note. That he never saw or heard of such a note till judgment was rendered by confession. It was the common note used when they sold flax; appellee does not swear he did not know the contents of the note, nor could he, for his defense was he did not sign it or any one like it. The instruction was not based on any evidence.

The appellant also assigns for error the refusal to grant a new trial on account of newly discovered evidence. We think the court did not err in so doing. The proposed evidence was in no wise conclusive and was only cumulative.

The appellant and one Van Zant testified that the note was given for a certain number of bushels of flax seed sold by appellee to appellant to sow in 1880. In his evidence on the trial appellant testified that he got no fifty bushels of flax seed of appellee but sowed his own.

The two witnesses newly discovered are only to corroborate appellant's testimony, and their evidence is only cumulative to his own. Under the well established rules of law this would not be sufficient grounds upon which to base a new trial. We see no error in the record and therefore affirm the judgment.

Judgment affirmed.

28	238
45	167
28	238
49	515
28	238
86	565

DENNIS MURTO
V.
CHARLES MCKNIGHT.

Statute of Frauds—Promise to Pay the Debt of Another—Instruction—Evidence—Practice.

1. A parol agreement to pay the debt of another is within the statute of frauds, unless the same is in the nature of an original undertaking and

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is based upon a valuable consideration received by the promisor.

2. A promise by a son to pay the father's debt to enable the latter to have his property removed from the State without interference, the relation of debtor and creditor between the original parties remaining unchanged, is within the statute of frauds.

3. In the case presented, the defense of the statute of frauds was properly admitted under the stipulation that all material matters should be admitted under the general issue as if specially pleaded.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Mercer County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. PEPPER & SCOTT, for appellant.

A contract was made between Charles McKnight, the defendant, and Dennis Murto, the plaintiff, by which Murto agreed to forbear instituting proceedings against Robert McKnight's property and to wait until the end of the year for the money.

This agreement to pay a sum of money is good and binding in law, and it does not matter that it was and is the exact amount due from Robert McKnight to appellant, nor that it had been due and owing. It is of no consequence that it is the same, or more, or less.

Any consideration is good in law if it is appreciable. The giving of a pepper-corn a year is a sufficient consideration in law. Hence the benefits to the party promising or the prejudice to the one to whom the promise is made need not be very great; it is enough if it is perceptible. *Wadsworth et al. v. Thompson*, 3 Gilm. 428.

"The moral obligation to fulfill a promise voluntarily made is not denied; for this reason courts have been always anxious to support promises when the slightest consideration can be made to appear." The above principles laid down in the case quoted have never been challenged or doubted.

Any act which is beneficial to one party or a disadvantage to the other is a sufficient consideration to support a contract. *Burch v. Hubbard*, 48 Ill. 164; *Buchanan v. International*

Bank, 78 Ill. 500; Cooke v. Murphy et al., 70 Ill. 96; Bishop v. Busse, 69 Ill. 403.

An agreement not to sell property or to release securities, an agreement not to sue or to dismiss suits already begun, as well as agreements to compromise a doubtful claim, are good and binding in law. McKinly v. Watkins, 13 Ill. 140; Parker v. Enslow, 102 Ill. 272; Pool v. Docker, 92 Ill. 501; Edgerton v. Weaver, 105 Ill. 45.

And they are just as binding if made on the part and behalf of another. Sigsworth was sued for allowing a cow in his care to be lost. His brother agreed to give and gave a note for the value of the cow if the suit should be dismissed, and it was held to be a good consideration for the note, and it could not be impeached. Sigsworth v. Coulter, 18 Ill. 204.

And it is not necessary that the promisor should be benefited in the least by the transaction, if the party to whom the promise is made is put in a worse condition. Hartford Fire Ins. Co., 97 Ill. 439.

If it was a promise to pay the debt of Robert McKnight, it was not within the statute of frauds, because it was based on the new and distinct consideration that the plaintiff, Dennis Murto, would let Robert McKnight go unmolested with his property from the State of Illinois, and thereby lose his opportunity to collect his debt. Brown on the Statute of Frauds, 212.

In Leonard v. Vredenburg, 8 Johns. (N. Y.) page 29, Judge Kent divides the promises to pay debts owing by others into three classes, and says the first two are within the statute; the third is not. The third class he defines, "is when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties." Templeton v. Bascom, 33 Vt. 132.

Messrs. BASSETT & BASSETT, for appellee.

The plaintiff could have brought suit against Robert McKnight at any time, on the note and account, and wrote to him about it after January 1, 1888. Charles McKnight had

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not received a cent in money or property to pay on the debt; he did not claim possession of, nor any lien upon, the property of Robert McKnight, and had no pecuniary interest in the property. Plaintiff did not part with any property, and defendant never from any source received anything for the promise.

In a very late case in the Court of Appeals of New York, the following rule is stated as the result of the latest decisions of the courts: "That where the primary debt subsists, and was antecedently contracted, the promise to pay it is original, when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor." *Rintoul v. White*, 26 Cent. L. Jour. 368.

The court in that case reviewed the case of *Leonard v. Vredenburg*, cited by counsel for appellant, and other cases following that, and said the definition in that case "assumed as the test of an original promise, that it was founded on a new or further consideration, of benefit or harm, moving between the promisor and promisee. There was found in this some inaccuracy of expression; for since every promise must have some consideration, to be valid at common law, and that necessary and inevitable consideration, wherever the debt to be paid antecedently existed, is always 'new' and 'further' because different from that of the primary debt, and since also such consideration does frequently move between the newly contracting parties, giving benefit to promisor or harm to promisee, it became apparent that the terms of the definition were dangerously broad and capable of a grave misapprehension, making it almost possible to say that a promise good at common law between the new parties, was good, also, in spite of the statute."

This broad definition was named in the case of *Mallory v. Gillett*, 21 N. Y. 412, which was an exhaustive case, and recited a great number of American and English cases, commencing with the case of *Leonard v. Vredenburg*.

In the case of *Mallory v. Gillett*, after citing a long list of

cases, it is said on page 427: "They all present examples where the collateral undertaking was founded on a consideration sufficient to sustain the promise, but of no personal concern to the promisor, yet the promises were void because they fall within the precise terms and the undoubted policy of the statute of frauds." *Brown v. Webber*, 38 N. Y. 187; *Ackley v. Parmenter*, 98 N. Y. 425; *Nelson v. Boynton*, 3 Met. 396; *Furbush v. Goodnow*, 98 Mass. 296.

To the same effect is *Birchell v. Neaster*, 36 Ohio State, 331. The decisions in our own Supreme Court sustain the rule first laid down in all of its terms, and is as strict as any of the courts of other States. We cite enough to show its uniform ruling: *Scott v. Thomas*, 1 Scam. 58; *Hight v. Wells*, 17 Ill. 88; *Eddy v. Roberts*, 17 Ill. 505; *Chilcote v. Kile*, 47 Ill. 88; *Wilson v. Bevins*, 58 Ill. 234; *Durant v. Rogers*, 71 Ill. 121; *Owens v. Stevens*, 78 Ill. 463; *Hardman v. Bradley*, 85 Ill. 162; *Denton v. Jackson*, 106 Ill. 433; *Power v. Rankin*, 114 Ill. 55.

UPTON, J. In June, 1887, Robert McKnight was indebted to Dennis Murto for about \$225 on a promissory note and book account. About that time McKnight went to Wichita, Kansas, to do some work, of which Murto was apprised. McKnight had in Keithsburg, Illinois (where all the parties in interest in this suit then resided), property, real and personal, sufficient to meet his indebtedness.

In August, 1887, McKnight remaining in Kansas, and Murto learning that the family and some personal effects of McKnight's were about to be removed thereto, saw Charles McKnight, a son of Robert, and had the following interview with him:

"I saw Charles McKnight and asked him if the folks were going to move to Wichita, and asked him how soon, and I think he said in a couple of weeks, possibly three. I asked him if his father was coming back, and he said that he had a good thing out there, or too good a thing to come back, and said they were going to ship his father's things out there. I asked him then how it would be about that note I held against his father, and he asked me how much it was, and I told him, and he said he would see me again about it. I am not positive

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whether it was that day or the day following, or it may be two or three days, but it was immediately after this talk that he came into the store and asked me again about it. I told him the note was past due. He asked me what the amount was, and I told him over \$200, and that there was also a small book account, and I told him I did not want to lose it. He asked me what I proposed to do about it, and I told him I proposed to take steps to collect it. I said to him, your father is worth property and I am going to get 'out an attachment. He went out of the store and came back in a few minutes and said: 'Don't do anything about that, and I will pay it; now, don't you do anything about it.' I said to him, you had better take the note and give me your obligation for it, and he replied that he did not want to do that, and said: 'Damn it, did I ever tell you I would do anything that I did not do?' He said: 'If I say I will pay it, I will pay it.' I then asked him to let me know when he would pay it, and he said, at the close of the year, when we close our accounts. That is the conversation, as nearly as I can tell it. I turned to my book-keeper and told him that it was all right, that Charles McKnight had assumed it. I was in my office at the time, that is, at the time of this last conversation, and Charles McKnight was leaning over the rail talking about it;" which was the material evidence offered in the case of the agreement, set out in plaintiff's declaration.

Murto did not attach the personal goods of Robert McKnight, and the same were about two weeks thereafter shipped to Kansas and the real estate in Keithsburg mortgaged for \$1,885. What the value of this realty was, does not appear.

In December, 1887, Murto had an accounting and settlement with Charles McKnight, of his individual accounts, at which time he refused to pay the debt of his father, saying his father would pay that, and denying that he had ever agreed to pay it. No account or charge was made against Charles McKnight of the indebtedness from his father to Murto, on book or otherwise, and the promissory note of Robert McKnight was held by Murto as a subsisting claim

against him. There was no contract or agreement, or memorandum thereof in writing, between the parties concerning the indebtedness or the payment thereof.

This suit was commenced in the Circuit Court of Mercer County, February 7, 1888, against Charles McKnight by attachment. The declaration is in assumpsit and contains a special count, the common counts and general breach.

The special count alleges that on the "first October, 1887, Robert McKnight was indebted to Dennis Murto in the sum of \$250, according to the terms of a certain promissory note for \$195 with interest at eight per cent. from date, and \$50 on account for goods, wares and merchandise, before that time sold and delivered to said Robert McKnight at his request; and being so indebted, the said Robert McKnight was attempting to dispose of his real estate with the intention of leaving the said State and with the intention of removing his personal effects from the said State, and in consequence thereof the said plaintiff was about to sue out, procure and levy an attachment on the property of the said Robert McKnight according to the form of the statute, and the said plaintiff could then, by so doing, have made the amount of his said demand, to wit, the sum of \$300, from the property of Robert McKnight; and thereupon the said defendant herein, who is a son of said Robert McKnight and who had learned of the intention of the plaintiff, came to him (plaintiff), and offered, if he would allow the said Robert McKnight to depart from the State, take his personal estate with him and sell his real estate, without plaintiff suing out and levying an attachment on any of said property, he, the said defendant, would assume and pay the said indebtedness and be personally responsible therefor; and the said plaintiff accepted said offer, whereupon the defendant assumed and agreed to pay said indebtedness, to-wit, the sum of \$300; since which time the said Robert McKnight has disposed of all his real estate in the State, and has departed from the State, taking with him all his personal effects, said plaintiff having allowed him, said Robert McKnight, so to do, relying upon the promise of the said defendant."

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There is no evidence in the record that Murto had or intended to take an attachment against the property of Robert McKnight either before or after the alleged promise of Charles McKnight. Plea of the general issue, under which, by agreement, all matters material were to be heard as if specially pleaded, and under which the statute of frauds was insisted upon as a defense.

The cause was heard by a jury and after the evidence closed on the part of the plaintiff and without offering any evidence on the part of defendant on this branch of the case, the court, on motion of defendant's counsel, excluded all the evidence offered on the part of the plaintiff's claim against the defendant, as set out in the declaration, and instructed the jury to find a verdict for the defendant, which was done, and plaintiff excepted; and, judgment being entered, and a motion for a new trial being overruled, the cause was appealed to this court, and the errors assigned are:

1st. The exclusion of the plaintiff's evidence from the jury.

2d. Instructing the jury to find a verdict for defendant.

3d. In refusing a new trial and rendering judgment on the verdict.

It is apparent that the court below held that the statute of frauds and perjuries, so called, applied to the case as made, and for that reason ruled out the evidence of the plaintiff and instructed the jury to find a verdict for the defendant.

If the statute and its provisions do apply, manifestly the court ruled correctly. This statute of frauds and perjuries, which is a substantial copy of the English statute, is believed to be in force in all the States of the Union, varied somewhat in expression, perhaps, but the same in substance and effect, and has been the subject of varied and contradictory construction.

The difficulty has not arisen from a want of perfect understanding of the terms used in the statute—for they are as accurate as human wisdom can make them—but rather, it is believed, in the favor or disfavor with which the different judges have regarded this statute in its practical operation. Those who have regarded it as establishing a hard rule in par-

ticular cases, have given it a narrow and illiberal construction. Indeed in some cases it will be found it has been so construed as to have no practical meaning whatever. On the contrary, those judges who have regarded the statute as establishing a sound rule of public policy in the transactions of life have always given it a true and just interpretation according to the exact meaning of the words used. The latter we regard as the safe and better rule. It conduces far more to a uniform administration of the law, as the Supreme Court of our State have long since determined. The general rule is that if the promise is in the nature of an original undertaking to pay a debt to a third party, and is founded on a valuable consideration received by the promisor himself, it is not within the provisions of the statute and need not be in writing to make it valid and binding. It will be regarded in the light of a contract for the benefit of a third party upon which such third party may found an action for the breach. *Wilson v. Bevans*, 58 Ill. 232; *Eddy v. Roberts*, 17 Ill. 505.

If, however, another is pecuniarily liable, or is the principal debtor, and the relations of debtor and creditor remain unchanged, both as to the right and the remedy, and no trust is created by the transaction out of which the promise arises, such promise is in its nature collateral and not original. If the debt is to be paid, or the duty performed, by him who is pecuniarily liable, the incident or collateral promise is of no force for any purpose; there is nothing remaining on which it can operate.

Tested by these rules the contract alleged in the special count of the plaintiff's declaration is void if not in writing. The debt of Robert McKnight in fact and form existed at the time of the making of the alleged promise. Robert McKnight continued and still continues liable to the same extent as if the promise had not been made. The relations of debtor and creditor were in no manner changed. No remedy, pledge or security was relinquished, and no trust devolved upon the defendant to execute by reason of the transaction. *Eddy v. Roberts*, 17 Ill. 505, and cases cited.

It is claimed by appellant's counsel that the facts in the

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case at bar brings it within the rule above stated for the alleged reason that by relying upon the defendant's promise he forebore to enforce the payment of his claim by suit until Robert McKnight's personal effects were removed from the State.

Suppose we concede for the argument's sake, but for no other purpose, that to be so, there is no fact in evidence in this record that Robert McKnight has not now, or at the commencement of this suit had not, sufficient estate in the county of Mercer out of which to make plaintiff's demand. True, that is averred in the declaration, but the record is barren of proof on that point; and even if proven, it would only go to the consideration, and could not supply the written contract or memorandum thereof, without which the consideration could not avail. But more than this, the contract, as set out in the declaration, though not supported by the proof, did not in the least prevent the plaintiff from proceeding and enforcing any remedy against the property of Robert McKnight, he had before the claimed promise was made. No remedy, pledge or security whatever was relinquished by Murto.

But it is urged that the case of *Bunting v. Darbyshire*, 75 Ill. 408, is decisive of this case in the plaintiff's favor. We think that case is not even in kinship with the case at bar. The instruction given to the jury in that case, among others was, "that if they further find from the evidence that at the time of the promise or agreement to pay said plaintiff, an execution was in the hands of the sheriff to collect said judgment, that the said defendant knew of the same and at the time had property in his possession belonging to Ebenezer Bunting, (principal debtor in the execution,) subject to said execution, and that the promise was made to prevent the levy of the said execution upon said property, and, in consideration thereof, the plaintiff did prevent the levy by agreeing to pay, and paying the judgment, they will find for the plaintiff."

That instruction brought the case strictly within the rule stated in the case cited in the 17th Illinois, *supra*, and the cases there referred to. In the case of *Bunting v. Darbyshire*, *supra*, the promisor retained the goods of the principal

debtor, subject to the execution, and which should have been applied in satisfaction thereof, to the relief of the surety, (the co-defendant in execution,) and upon that consideration authorized the surety to settle the judgment, and for the property thus received of him, he would repay the surety the money expended in such settlement. That was an original and in no sense a collateral undertaking, and has never been understood by the bar or the bench as modifying the rule, as stated in the 17th Illinois, *supra*, in the least degree. It is in fact and essence within the rule first stated above as the general rule of distinction of original from collateral undertakings. *Power v. Rankin*, 114 Ill. 52, and cases cited. We have carefully examined the record in this case, and we think the court below was justified in holding that it was within the statute of frauds and perjuries, for the reason that the alleged contract was not in writing. There was, in the case at bar, no novation of the debt, and we think the stipulation in regard to special pleas was properly allowed by the court in the exercise of its directing power, and was broad enough to admit of the defense of the statute as claimed, even if the statute could not be, by the nature of a demurrer to the evidence. We find no error in this record of proceedings in the court below and the judgment is affirmed.

Judgment affirmed.

JOSEPH R. BESSE

v.

GEORGE W. SAWYER.

Highways—Law of the Road—Injury to Team—Conflict of Evidence—New Trial—Instructions.

1. In an action to recover for injury to a horse and sulky, resulting from an altercation upon the highway, this court declines to interfere with

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the verdict of the jury, the evidence being wholly conflicting and apparently irreconcilable.

2. A new trial will not be granted upon the ground of newly discovered evidence when the same is merely impeaching and not conclusive in character.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Whiteside County; the Hon. CHARLES J. SCOFIELD, Judge, presiding.

Mr. WILLIAM H. ALLEN, for appellant.

Mr. W. J. MCCOY, for appellee.

UPTON, J. This is an action for an alleged injury to a horse and sulky of appellant, originally brought before a justice of the peace of Whiteside county, in which, upon trial, a judgment was rendered in favor of the appellant for \$40 and costs, from which Sawyer appealed to the Circuit Court of that county. On the trial in the Circuit Court the jury found a verdict for the appellee, Sawyer. A motion for a new trial being overruled, judgment was entered on the verdict. The case is in this court by appeal from that judgment.

The appellant, Besse, was, on the evening of the 2d day of August, 1887, driving along a public highway with a horse, in a light sulky, nearly two miles southwest of Erie, in Whiteside county, and overtook the appellee in a narrow place on said highway.

The appellee was driving a span of horses attached to a double wagon, in the box of which were fifty or sixty bushels of rye, loose in the box, weighing nearly 3,000 pounds. The tire on the wheels of appellee's wagon, in consequence of the wheels becoming dry, were loose and working off, requiring frequent stoppage of his team to drive the tire on, to prevent breaking of the wheels. The highway was quite sandy at the point in question, and in consequence of the condition of the highway, the loaded wagon and the imperfect condition of its wheels, it was not practicable for appellee to drive outside of the beaten track of the highway.

It was under such circumstances that appellant overtook appellee. On the trial in the Circuit Court appellant contended that the horse he was driving was a young, spirited horse, headstrong and difficult to control; that upon coming up with appellee he so informed him, and requested him to turn out of or upon one side of the highway, and allow him to pass by, which he refused to do, but instead told appellant to go by, if he knew enough; called appellant improper names, and treated him with contempt; that appellant being unable to hold back his horse any longer, upon getting near the rear of appellee's wagon appellee struck the horse over the head with his whip, which frightened it, rendering it more difficult to manage, and that, seeing the effect of the first blow, he immediately struck the horse again, which caused it to rear up, turn out of the highway and jump into a deep ditch, three feet or more deep, overturning the sulky, throwing the horse and pitching appellant with great violence upon the ground, thereby breaking the sulky, damaging the horse and injuring appellant.

It was contended on the part of appellee that when overtaken by appellant, and upon his request to him to turn out of the highway so that appellant might pass, he informed him of the load upon his wagon, the condition of the wheels, the fact that it would be difficult, if not impossible, for him to get back into the track of the highway without breaking down, and informing appellant that a few rods further on the highway was broad enough for him to pass without danger to either appellant or himself, asking him to await the arrival at the point designated, which would be but a few minutes; that while speaking the tire came partly off the wheel of his wagon and he was compelled to stop and drive it on; that he apologized for the delay to appellant; that the appellant got into a violent passion, threatened to run the thill of his sulky through the end board of the wagon box and empty the rye, with which the wagon was loaded, upon the ground, drove his horse up to the end of the wagon and allowed it to eat of the rye in the wagon; that upon being requested to keep his horse from damaging and wasting the rye appellant swore his horse should eat all he wanted of it; that appellee told appellant, if

he did not keep his horse out of his wagon he should strike the horse with his whip; that appellant, with curses and threats, drove his horse again up to the wagon, and suffered it to eat therefrom, upon which appellee struck the horse upon the head with a whip, the handle of which was of hazel brush, and the lash a string cut from a boot leg; that immediately the appellant, in a great passion, drove his horse along the near side of the appellee's wagon, and standing up in his sulky, with his lines in his left hand and his whip in his right hand, struck appellee (who was sitting upon the seat of his wagon) a vigorous blow upon his head and shoulders; that the sound of the blow seemed to frighten appellant's horse, and it jumped into the ditch and overturned the sulky and occasioned the damages complained of, which were claimed to have been quite small at most.

Upon this contention quite considerable testimony was heard on both sides, which was wholly conflicting and apparently irreconcilable.

The jury, after hearing all the evidence, found a verdict for the appellee (defendant below), and appellant having brought the case to this court to reverse the judgment upon that verdict, assigns for error in the trial court the admission of improper and the rejection of proper evidence on the trial, the giving of improper and the refusal of proper instructions to the jury, the giving of its own motion by the court improper instructions, overruling appellee's motion for a new trial and the rendition of judgment against appellant.

In regard to the alleged errors of the refusal of proper evidence and the admission of improper evidence by the trial court, it is sufficient to say that no evidence of the character complained of has been pointed out in the argument, and none is apparent to us on the record materially affecting the issues in the case.

It is claimed, however, that the court erred in refusing to give the third instruction asked for by the appellant; that the court also erred in the instruction given on its own motion, and also that the court erred in giving to the jury the instructions asked for by the defendant. We have carefully examined the

instructions in this record, and we fail to find any substantial error therein; taken as a series we do not think them misleading, and while, perhaps, the law of the case was not so fully set forth or clearly stated as might have been done, it is in our judgment manifest that, upon that branch of the case, no injustice has been done either party, and we do not feel called upon to interfere.

Of the error assigned in not setting aside the verdict and granting a new trial, it is sufficient to say that, from the evidence and the facts to which we have referred, no error in that regard was committed by the trial court. Here was a sharp conflict of evidence, which was the peculiar province of the jury to reconcile, if possible, and from which to determine the facts in their *own* minds as to the right of this contention and the consequent merits of this controversy. And even though the trial court or this court might have been better satisfied with a different verdict, still, neither that court nor this would be authorized to interfere, if the evidence heard on the part of the appellee, standing alone, would justify the verdict.

If the jury were justified from the evidence in rendering the verdict, as we think they were, it follows that appellant is not entitled to any damages in this case, and hence, whether he suffered damages to his person, became a wholly immaterial question, and the instruction in that regard could not have been material to the issue of this case.

But it is said the court below erred in not granting a new trial for newly discovered evidence. The motion for a new trial, based upon the affidavits presented in this record, we think was properly denied. When examined in connection with the evidence in this record, such newly discovered testimony would only have been impeaching and in no manner conclusive in its character, it is apparent. The rule is too well settled to require authoritative citations, that a new trial will not be granted when the newly discovered evidence is of that character. We have carefully examined the record in this case and fail to find therein any material error to justify our interference with the judgment of the court below, and that judgment is affirmed.

Judgment affirmed.

Wessels v. Wessels.

HARMENA F. WESSELS

v.

JELDERK WESSELS.

Divorce—Custody of Children—Alimony—Cruelty—Condonation.

1. A violent temper in a wife and the habitual use by her of opprobrious epithets toward her husband, will not justify personal violence on his part.

2. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated; it is dependent upon future good conduct, and must be free and voluntary.

3. In the case presented, the proof supports the allegations of the bill and the court erred in not granting a divorce to the complainant.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Stephenson County; the Hon. WILLIAM BROWN, Judge, presiding.

Messrs. H. C. BURCHARD and P. J. GEIB, for appellant.

Mr. HENRY C. HYDE, for appellee.

C. B. SMITH, J. This was a bill filed by Harmena F. Wessels, appellant, against her husband, Jelderk Wessels, appellee, asking for a divorce on the ground of extreme and repeated cruelty, and also asking for alimony and the custody of her infant children.

The answer denies some of the specific acts of cruelty and admits others, and alleges great provocation as an excuse therefor.

He charges his wife with having been an habitual drunkard before and ever since they were married, but says he did not know she was addicted to the use of liquor before they were married, and charges that she has an ungovernable and violent temper, and that in her fits of passion and anger she rails at him and calls him vile names and accuses him of

vile practices, and that occasionally, smarting under these accusations, he has used some violence, but alleges that he immediately repented and sometimes asked his wife's pardon, which was given.

The case was heard on bill, answer and replication and the proofs taken at the January term, 1888, and a decree was entered dismissing complainant's bill. From that decree appellant has taken an appeal and brings the record here for review.

The parties were married in 1878; they lived and were raised together in the same neighborhood and evidently were well acquainted with each other long before they were married. Whatever of love or affection or even of respect may have existed between them before and at their marriage, it is very evident that all traces of any such feelings soon vanished after their marriage, never to return. Their mutual vows at the marriage altar have been utterly forgotten and ignored. In their home there has been no mutual sympathy, no love, nor even a decent respect for the rights of each other; the turbulence and violence which began soon after their marriage, has grown until it is impossible for them to live longer together. They were both of German parentage; he of low Dutch, she of high Dutch.

The proof discloses numerous acts of personal violence inflicted by the defendant upon his wife, of greater or less severity. The first account of their trouble occurred within three months after their marriage. The defendant then first grossly insulted his wife, and then, because she resented it, he violently threw or pushed her out of doors. She had been ironing him a white shirt and had not succeeded in ironing it as nicely as he desired, and he upbraided her in an angry and insulting manner, and said he did not know he had married a wife that did not know how to iron a white shirt, and thereupon he threw the shirt in a rag-bag.

Again, in 1880, a controversy grew up in the home about the relation of defendant's sister and his hired man, and complainant made an insinuation touching the propriety of his sister's conduct toward the hired man, when defendant became

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enraged, and slapped his wife in the face, and then chased her in the room and struck her in the face with his fist.

Again in December of the same year they had a quarrel, and defendant told his wife to keep still, which she declined to do, and he then put both hands around her neck and choked her.

In 1871 they got into a controversy about chopping up some beef out in the yard; defendant wanted to go to Freeport and his wife wanted him to stay and chop the beef. He ordered her into the house and threatened her with the axe, and she failing to go, he chased her into the house with the upraised axe. She called the school teacher to defend her, and thereupon he desisted from further pursuit.

In 1882, in December, he hitched up his team to go to mill and his wife desired to go with him as far as her sister's. She got on the load and said she would go. He said she should not, but assigned no reason why she could not ride with him; she became angry at his refusal to allow so reasonable a request and got down off the load and pulled out the whiffletree pins, and threw them away in the snow. Thereupon defendant seized his wife by the hair of the head and pulled her down on the ground and dragged her two rods through the snow, and then whipped her with a rawhide horse-whip around her body a half dozen times, as the witness who saw it said, "like I do around the horses," until "she hollared, John, help me." She then ran away and he ran after her. She says, "He struck me just like an old horse—it left red stripes across my back."

In 1884 another row came up about some painting he did on the house, which her father was to pay for; in an angry mood he was scratching the door with his feet, and his wife objected; he then said if "the old devil," meaning his wife's mother, did not give him some money for the painting he would cut the door, and did cut it. The wife became angered and called him a "self-abuser," whereupon he struck her over the head with a piece of pine board, nearly felling her to the floor, cutting her through the scalp and making a bleeding wound.

Again on a subsequent occasion, about two months before her child was born, in the winter time, on the occasion of some one of their many quarrels, he pushed his wife out of doors and locked the doors against her.

In addition to these acts of personal violence, he, on many occasions, accused her of a want of chastity, charged her with being an "old whore" and charged her with doing "something mean" with a little jew peddler and with a doctor. Told her one of her children was the child of Henry Greenwold, and charged her with going to see Henry Greenwold every time she went to town, and with "doing something mean" with him. On the occasion of the birth of two of her children he intimates that they are not his children and says he will not get her a doctor. On one occasion when they had been butchering, he became angry at some of her abusive language and went and got a new dress pattern she had bought of the jew peddler and put it in a tub of pigs' entrails. The foregoing recitals of his conduct toward his wife, running through the entire period of their married life, shows a systematic course of brutality and cruelty, both of act and word, rarely equaled, and yet we have recited but small part of it. The defendant seeks not to avoid the force and effect of this personal violence by denial of its truth (for the most of it he admits and other parts of it he says he can not remember), but rather by justifying himself and by condonation. How does he do it?

The answer charges the complainant with drunkenness in the first place. The evidence shows that the complainant occasionally drank intoxicating liquors, and that on several occasions she was sensibly under their influence; but we do not think the evidence establishes the fact that she was a drunkard or in the habit of getting intoxicated within the legal meaning of that word. She admits drinking whisky, but says it was at the time of her confinement, when she needed it, and at times of holiday and festival occasions with her family and her people, when most German people followed the custom, and that it was with the knowledge and consent of her husband. The defendant himself swears that he kept liquor in the house, and that he also drank wine, beer and whisky.

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The most serious charge made in answer and supported by the proof was her violent temper, and vulgar and abusive language toward the defendant. The proof abundantly supports this charge against the appellant and shows her to have been utterly wanting in womanly qualities of refinement and modesty. The language she used toward her husband in the presence of the family, and of strangers, was too coarse and vulgar for repetition here; but everything we have said in relation to her manners and language as applied to her husband will apply to the fullest extent to his language and manners toward her. Both of them seem to have been utterly shameless and regardless of all the amenities and decencies of life in their intercourse with each other. To recite these long lists of quarrels and show their origin and ending would serve no useful purpose and we shall not attempt it further than to say that the defendant was the first aggressor in the controversy over the shirt, and if, before then, there had been any bonds of affection between them, he broke the slender tie by wantonly wounding the feelings of his young wife, and then following it up with personal violence from that time to the end.

But even if the defendant himself had not been as guilty as his wife in provoking quarrels, and in the use of coarse and vulgar language to her, and had himself been free from fault in that respect, we must still hold that her violent temper and opprobrious epithets, however insulting and scandalous they may have been, gave him no license to correct her by personal and physical violence. 1 Bishop, Mar. and Div., Sec. 765, note 2; Dillon v. Dillon, 32 La. Ann. 643; Gordon v. Gordon, 48 Pa. St. 226; Marsh v. Marsh, 64 Iowa, 667; Boeck v. Boeck, 16 Neb. 196; Eidenmiller v. Eidenmiller, 37 Cal. 364; Hawkins v. Hawkins, 65 Md. 104.

It has uniformly been held in this State that no language, however opprobrious or insulting, will ever justify, even strangers, beating each other, and certainly the rule ought not to be relaxed as between husband and wife. To allow the husband to beat his wife into submission, or to correct her delinquencies, would be a return to the barbarisms of the old

common law and make the wife the mere vassal or slave of the husband.

Lastly the defendant pleads condonation. At the time of the birth of the last child, complainant swears that when she was suffering intense pain and was very sick, scarcely knowing what she did or said, her husband asked her to forgive him all the wrongs he had done her, and they would afterward live as they ought to, and that then she told him she would forgive him. She swears that it was just before the birth of their last child, and when she was suffering the pains of childbirth, and when he thought she was going to die, he asked her to forgive him, and that she did so. If, under the circumstances upon which this forgiveness was obtained, it could be regarded as the free and voluntary act of the complainant, and be a condonation of the many wrongs done complainant, then the law imposed upon him the duty of treating his wife thereafter with conjugal kindness and affection. Condonation is forgiveness for the past upon the condition that the wrongs shall not be repeated, and is dependent upon future good conduct, and it must be free and voluntary. *Sharp v. Sharp*, 116 Ill. 509; *Farnham v. Farnham*, 73 Ill. 497.

The proof shows that immediately after this forgiveness he again commenced to treat her, if not with actual cruelty, yet with cold indifference and neglect, using many hard and cruel expressions to her in her sickness, when he spoke at all. She swears that he hardly spoke to her for two months, and on one occasion, at least, kicked her from his bed—when she went to plead with him to be kind to her, at least for the sake of the children. She swears he was cold and indifferent to her, and that he told her “he was cold to her as a stone,” and he himself admits that he made use of this expression, and makes no claim on the witness stand that he treated her with kindness and affection after she had forgiven him. The proof also shows that since that time she has patiently borne to renew her former offenses, and has kept her promise to treat him kindly.

We think that whatever of condonation there may have been between the parties, it was soon forfeited by the defend-

Heeren v. Kitson.

ant's subsequent bad conduct toward his wife, and he thereby renewed his former acts of cruelty. We think the proof supports the allegations of the bill, and that the court erred in dismissing the bill.

The cause will be remanded with directions to the court to set aside the order dismissing the bill and to grant the divorce at the costs of the defendant, and to make such order concerning the alimony and allowances and the custody of the children as the court shall deem right and just.

Reversed and remanded.

ALTJA R. HEEREN
V.
WILLIAM KITSON ET AL.

Fraudulent Conveyances—Bill to Set Aside—Father and Son—Wages—Express Contract—Preference between Creditors—Amendment—Sec. 37, Chap. 22, R. S.—Sworn Answers.

1. Upon a bill to set aside an alleged fraudulent deed and a mortgage executed from a father to his son, it is *held*: That the father, being lawfully indebted to his son, might pay him in preference to other creditors; and that, while the testimony creates strong suspicion against the good faith of the transaction, it does not overcome the sworn answers.

2. In this State bills, answers and replications may be amended, at any stage of the proceedings, on such terms as the court may impose.

3. Where the bill of complaint against two defendants calls for answers under oath, each answer must be overcome by at least two witnesses, or what is equivalent to the testimony of two witnesses.

[Opinion filed December 8, 1888.]

APPEAL from the County Court of Rock Island County; the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. JOHNSTON & JOHNSTON, for appellant.

Fraud is rarely perpetrated openly and in broad daylight. The proof is very seldom perfect and direct, but is dependent

upon very many little circumstances and conclusions to be drawn from the general aspect of the case. A resort to presumptive evidence becomes absolutely necessary to protect the rights of honest men from this as from other invasions. Again, it is said that direct evidence of witnesses speaking of their own knowledge of fraudulent intent, is not required. It is sufficient to prove facts and circumstances strong enough to justify a jury in finding such an intent. And, again, nor is clear and indisputable evidence required to establish fraud. *Newman v. Cordell*, 43 Barb. (N. Y.) 448 and 461; *Kaine v. Weigley*, 22 Pa. St. 183; *Babcock v. Eckler*, 24 N. Y. 632; *Gill v. Crosby*, 63 Ill. 190; *Bowden v. Bowden*, 75 Ill. 143; *Carter v. Gunnels*, 67 Ill. 270.

In *Wait on Fraudulent Conveyances and Creditor's Bills*, section 241, page 332, the author gathers a few of the *indicia* or badges of fraud, of which we believe the following to be present in this case:

First. The absence of memoranda or of any record of the consideration. *Hubbard v. Allen*, 59 Ala. 300.

Second. No agreement as to the exact terms of settlement. *Lawson v. Funk*, 108 Ill. 502.

Third. A false admission of the receipt of the consideration. *Baltimore & Ohio R. R. Co. v. Hoge*, 34 Pa. St. 214.

Fourth. Unusual clauses in the instrument. In this case the reservation of the right of homestead was made simply and solely to harass, hinder and delay the complainant. *Pilling v. Otis*, 13 Wis. 496.

Fifth. A sale not conducted in the usual and ordinary course of business. *State ex rel. Pierce v. Merritt*, 70 Mo. 283.

Sixth. Conduct of the parties which is exceptional and peculiar. The only cases ever heard of where parties have conducted themselves as these parties are shown to have done, claiming what these parties claim, are those cases similar to this where such a claim as this is invented, and set up as a consideration for a deed made to hinder, delay and defraud creditors. And in every similar case the court has placed such a construction upon it. *Haney et al. v. Nugent et al.*, 13 Wis.

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290; Gardinier v. Otis et al., 13 Wis. 460; Brinks v. Heise, 84 Pa. St. 253; Lawson v. Funk, 108 Ill. 502; Marshall v. Green, Ex'r, 24 Ark. 419; Glenn v. Glenn, 17 Iowa, 498.

Seventh. Absence of authentic evidence of indebtedness considerable in amount. There was here no such evidence. Newman v. Cordell, 43 Barb. (N. Y.) 461; Embury v. Klemm, 20 N. J. 523; Brinks v. Heise, 84 Pa. St. 253.

Eighth. Contradictory and irreconcilable accounts of the transaction given by vendor and vendee. Haney v. Nugent, 13 Wis. 290; Marshall v. Green, 24 Ark. 419.

Ninth. Absence of means in the vendee. Stevens v. Dillman, 86 Ill. 233; Embury v. Klemm, 30 N. J. Eq. 523.

Tenth. Absence of the evidence supposed to be within reach of the party charged with the fraudulent act. Henderson v. Henderson, 55 Mo. 559.

Eleventh. Neglect to testify.

In this case, William Kitson, one of the defendants, although present at the hearing, and although his evidence might have served to explain and make clear many of the inconsistencies in their defense, neglects to testify; and the language of the court in Bowden v. Johnson, 107 U. S. 262, seems to apply with great force. "The omission of Johnson to testify as a witness for himself, in reply to the evidence against him, is of great weight." Henderson v. Henderson, 55 Mo. 559; Bump on Fraud. Con., page 95; Goshorn's Ex'r v. Snodgrass et al., 17 W. Va. 770; Glenn v. Glenn et al., 17 Iowa, 498.

Twelfth. Relationship of the parties when the transfer covers the debtor's entire estate and other badges accompany it.

It is true that the mere fact of relationship will not of itself defeat a conveyance otherwise made in good faith, but where a transaction is so surrounded and marked with suspicious circumstances and badges of fraud as this one is, then the close relationship of the parties and the mutual dependency and desire to favor and protect each other, which must exist of very necessity, becomes the strongest badge of all. And the authorities are substantially in accord as to this fact. Reiger v. Davis, 67 N. C. 189; Embury v. Klemm, 30 N. J.

Eq. 523; Demarest v. Terhune, 18 N. J. Eq. 49; Haney v. Nugent et al., 13 Wis. 290; Lawson et al. v. Funk et al., 108 Ill. 502; Glenn v. Glenn, 17 Iowa, 498.

Messrs. SWEENEY & WALKER, for appellee.

It is asserted on behalf of the appellant, that it is not necessary that there be "clear and indisputable evidence to establish fraud." This, however, is not, we think, an accurate statement of the law. It is true that the evidence need not be indisputable in the sense that it must be irresistible, yet it must be very clear and satisfactory, and sufficient to produce a conviction. Bump on Fraudulent Conveyances, 602; Schroeder v. Walsh, 120 Ill. 403-409.

The cases cited by counsel, from this State, only go to this extent. Mr. Bump, in his work on Fraudulent Conveyances, on page 603, says: "While the law abhors fraud, it is unwilling to impute it on slight or trivial evidence, and thereby cast an unjust reproach upon the character of the parties. 44 Ill. 218. Such an imputation is grave in its character, and it can only be sustained on satisfactory proof." And, after discussing the questions further, says the test is "its sufficiency to satisfy the mind and conscience, and produce a satisfactory conviction or belief. 67 Ill. 270. The proof, however, must be satisfactory. It must be so strong and cogent as to satisfy a man of sound judgment of the truth of the allegation. It need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts, from which a legitimate inference of a fraudulent intent may be drawn. * * * As an allegation of fraud is against the presumption of honesty, it requires stronger proof than if no presumption existed."

In the case of Schroeder v. Walsh, *supra*, our Supreme Court quotes this language, and on page 409 say: "This court has frequently held that the evidence must be clear and satisfactory to establish fraud."

Counsel do not pretend to claim that such a contract is void. They admit it to be valid if made, but claim the relationship, etc., stamp it as a fraud. On the contrary, we insist that the

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fact of relationship does not, under the proof here, have any bearing upon the contract. *Nelson v. Smith*, 28 Ill. 495; *Schroeder v. Walsh*, 120 Ill. 411.

Our Supreme Court, in the case of *Freeman v. Freeman*, 65 Ill. 106, went much further than in the present case and allowed a son to recover for work done for his father for several years after he became of age, under an implied contract.

The case of *Ginders v. Ginders*, 21 Ill. App. 522, decided by this court, sustains the contract in question here. In the case of *Hayden v. Henderson*, 21 Ill. App. 299, the court likewise sustained a recovery upon an implied contract.

The law always presumes persons are honest, and when the circumstances proven can exist consistently with an honest intent, then the transaction must be upheld. *Mey v. Gulliman*, Adm'x, 105 Ill. 285; *Schroeder v. Walsh*, 120 Ill. 410; *Cornell v. Gibson* (Ind.), 16 N. E. Rep. 131; *Jackson v. Badger* (N. Y.), 16 N. E. Rep. 208.

C. B. SMITH, J. This was a bill filed by Altja R. Heeren against William and John F. Kitson and S. B. Stoddard for the purpose of setting aside an alleged fraudulent deed made by William Kitson and his wife to their son, John F. Kitson, and also to set aside a mortgage by the Kitsons to Stoddard on the same date of the deed and which was also alleged to be fraudulent.

On February 12, 1886, complainant recovered a judgment against William Kitson and one C. M. Moody for \$980 and costs in the Circuit Court of Rock Island county. An execution was duly issued on this judgment and placed in the hands of the sheriff, but nothing was made, and nothing found in the hands of the judgment debtors out of which to make the judgment or any part of it. The insolvency of Moody is admitted.

The bill alleges that prior to the rendition of the said judgment, William Kitson was the owner in fee simple of the south half of the southeast quarter of section 15 and the northwest quarter of northeast quarter of section 22, town 18 north, range 2 east, in Rock Island county, and it further alleges that

prior to the rendition of the judgment, but after the indebtedness on which judgment was rendered had accrued, viz., on the 13th day of February, 1885, the said William Kitson made a pretended deed in fee simple for said premises to John F. Kitson for the expressed consideration of \$2,400, and that in said deed William Kitson reserved his homestead interest. The bill charges that this deed was a mere sham and fraudulent, and made for the purpose of preventing complainant from making her judgment out of the land, and charges that there was in fact no consideration for such conveyance from the son to his father, and charges that John F. Kitson was a man of no pecuniary responsibility and possessed of little or no property other than the land so fraudulently conveyed to him by his father, and charges that William Kitson has no property in his name out of which the judgment can be made; that payment of the execution has been demanded by the sheriff and refused by William Kitson and that he pretends he has no property.

The allegation that the mortgage was fraudulent was abandoned on the trial by the complainant. The oath of defendants to the bill was not waived, and, in addition to a general answer, the defendants were required to answer the following interrogatories, viz.:

1st. Whether the sum named as a consideration in said deed, dated February 13, 1885, was actually paid by said John F. Kitson to said William Kitson?

2d. If any part of said sum was paid, what part, in what way, in what amounts, and when was it paid?

3d. How, when and from what sources the said John F. Kitson obtained the money paid on said deed, if any was paid?

4th. The true purpose and intent of said deed and conveyance of said real estate from said William Kitson to said John F. Kitson?

5th. How much money, if any, was actually paid by the said Simeon B. Stoddard to the said William Kitson for the said mortgage?

6th. The true purpose and intent of the said mortgage?

The bill prayed that the deed and mortgage be set aside as fraudulent.

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The defendants, John F. and William Kitson, deny specifically every fraudulent allegation in the bill, and allege that on the 13th day of February, 1885, William Kitson was indebted to John F. Kitson in the sum of \$2,400 for services rendered before that time at his request, and that to satisfy that debt, and in the further consideration that John F. Kitson would pay off the \$500 mortgage due to Stoddard on said land, the deed was made to said John F. Kitson, and not for any other consideration whatever, and that said deed was a real, actual and *bona fide* conveyance of said land, and was not made by defendants or either of them with intent to defraud complainant or any other creditor of complainant. The answer also states that John F. Kitson in fact paid said mortgage and released it from the land and gave his own note instead thereof, and to secure it gave another mortgage on the same land signed by himself, his father and May Kitson.

In addition to the foregoing answer John F. and William Kitson each for himself made answer to the interrogatories as follows:

“As to said first interrogatory: that said sum named as the consideration in said deed, dated February 13, A. D. 1885, was actually paid by this defendant, John F. Kitson, to said Wm. Kitson in services and labor before that time rendered by the said John F. Kitson for the said William Kitson at his request.

“As to said second interrogatory: that all of said sum was paid as stated in our answer to first interrogatory, in the manner and at the time therein stated, and previous to the delivery of said deed.

“As to said third interrogatory: that the said John F. Kitson obtained said money by means of his own personal efforts and labor performed, laid out and expended by him as laborer and manager of the farm of the said William Kitson, upon and in connection with the land in said bill described.

“As to the fourth interrogatory: that the true purpose and intent of said deed was to pay a *bona fide* debt which this defendant, William Kitson, thus owed to this defendant, John F. Kitson, and was not given for any other or different purpose or intent.

“As to said fifth interrogatory: that the said defendant, Simeon B. Stoddard, on or about the 13th day of February, 1878, paid to the said William Kitson the sum of \$700 in cash, as the sole and only consideration for the note and mortgage given of that date, which was duly recorded in the recorder's office of said Rock Island county, in Book 27 of Mortgages, on page 127, and that the mortgage referred to in said interrogatories was given for the purpose of paying or discharging \$500, the same being the balance due on said first-mentioned mortgage; and that said first mortgage was never paid in any other or different manner, except \$200 of the principal thereof, which was paid by this defendant, William Kitson, on February 15, 1882.

“As to the said sixth interrogatory: that the true intent and purpose of said mortgage referred to in said interrogatory was to pay and discharge said balance of \$500 remaining due to said defendant, Stoddard, upon said first mortgage and to procure the surrender to this defendant, William Kitson, of his said note secured by said first mortgage and dated February 13, 1878, and to procure for this defendant, John F. Kitson, an extension of the time of payment of said \$500, a part of the money loaned by said Simeon B. Stoddard on the date of the said first mortgage, which this defendant, John F. Kitson, assumed as a part of the consideration for the conveyance of said land to him by the said William Kitson.

“And these defendants, further answering, say: that said complainant is not entitled to the appointment of a receiver as prayed for in said bill.

“And these defendants, further answering, deny that the complainant is entitled to the relief, or any part thereof, in the said bill of complaint demanded, and pray the same advantage of this answer as if they had pleaded or demurred to the said bill of complaint, and that they may be dismissed with their reasonable costs and charges, in this behalf most wrongfully sustained.

“WILLIAM KITSON,
“JOHN F. KITSON.”

The answer and the answer to the interrogatories were

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sworn to. Exceptions were filed to the answer and sustained. Complainant amended her bill, and defendants were required to answer the amended bill and also to amend their answer.

The amended answer of the Kitsons set up that John F. Kitson became of age on the 27th of February, 1875, and that the father was sixty-three years of age at that time, and in feeble health and unable to work on or manage his farm; that John was his only son, and that he then proposed to go and work for himself; that it was then agreed between the father and son that, if the son would stay at home and work and manage the farm, he should be paid as much for his work as any other man would give him, and that he would pay him \$20 per month for his work from the time he became of age, and that thereupon John accepted such proposition and continued so to work for his father and manage the farm, until the 13th day of February, 1885, the date of the execution and delivery of the deed, and that said William Kitson never paid his son any portion of the amount he so agreed to pay him for his services, except enough to clothe him and occasionally a dollar or less, at infrequent times, for his spending money, not exceeding \$30 per year, and that, at the date of said deed, there was then actually due John F. Kitson from his father under the terms of the contract the sum of \$2,400.

Replications were filed to the answer and the cause referred to the master, who took the evidence and reported it back. Upon the hearing the Circuit Court found both the deed from William Kitson to John F. Kitson, and the mortgage from the Kitsons to Stoddard valid instruments and free from fraud, and dismissed the bill.

We have carefully studied the evidence in this record and can not say that the court erred in finding as it did. The complainant saw fit to call for answers under oath, and thus gave the defendants the advantage of two sworn answers which must each be overcome by at least two witnesses, or what is equivalent to the testimony of two witnesses.

While the testimony on behalf of the complainant creates a strong suspicion against the good faith of the transaction, we think it fails to overcome the sworn facts set up in the

answer and amended answer. The evidence discloses a preference between two creditors by William Kitson, rather than a fraudulent conveyance to one not his creditor. From the evidence he was as much bound legally and morally to pay his son for his ten years' unpaid labor, as he was to discharge the debt of complainant, and he evidently and in good faith regarded his obligation to pay his son greater than his obligation to pay complainant's judgment, for which he was but a security on the note. While he was as much legally bound to pay the one as the other, still we do not think, under the evidence, that because he chose first to pay his son, although it took all he had, this justifies the charge that in doing so he was guilty of a fraud. Nor was there any fraud on the part of the son in attempting to secure his debt. The fact that his father was his debtor furnished no sufficient reason why he should not insist on payment even to the exclusion of others, if there was no more than enough to pay him. There is no doubt that John F. Kitson did remain at home substantially all the time after he became of age and worked on his father's farm and managed it for him for about ten years.

This time belonged to him and he was as much entitled to be paid for it as the complainant was to have her judgment paid. Both father and son swear that this service was rendered under the terms of an express contract and that the service was rendered in pursuance of it, and that it has not been paid for. There was, therefore, a valuable consideration for the deed, and large enough to support it, in the absence of proof to show that the land was worth more than the \$2,400, with the mortgage and homestead incumbrance added.

Appellant complains that the court erred in permitting appellees to amend their answer and cited decisions of other States and the general chancery practice of courts of equity. This objection can have no force in this State under our statute. Sec. 37, Chap. 22, Chancery Practice Act, expressly confers on courts the power to allow amendments to bills, answers and replications at any stage of the proceedings, on such terms as the court may deem right.

But, aside from this statute, the complainant asked and

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obtained leave to amend her bill, and took a rule on defendants to answer the amended bill. She can not now complain that this answer does not suit her, if it be in response to her amended bill. In this record we find no error and the decree is affirmed.

Decree affirmed.

JULIA GRAHAM
V.
JOHN EISZNER.

28 269
43 179

28 269
93 4301

Negotiable Instruments—Notes—Name of Maker—Failure of Consideration—Sales—Express or Implied Warranty—Whisky Barrels—Leakage—Written Contract—Parol Evidence—Instructions—Pleadings—Variance—Practice.

1. The appellant can not complain of an error committed by the court in settling the pleadings when no harm has resulted to him therefrom.

2. A person may adopt any name, style, or signature over which he may transact business, issue negotiable paper and execute contracts, wholly different from his own name, and he may sue and be sued by such name, style, or signature.

3. Parol contemporaneous understandings can not be allowed to vary an unambiguous written contract.

4. Letters written by a party to a suit are inadmissible in his own behalf, the same being no part of a mutual correspondence.

5. A former contract in writing is inadmissible in evidence in a suit between the parties thereto upon one of later date and different tenor.

6. The law will not hold another liable for the loss of property where the owner has stood by and seen it go to waste, when by reasonable exertion and expense he might have saved it.

7. One can not complain of instructions, which, though open to formal objections, contain no error of substance.

8. It is proper to refuse an instruction which has no basis in the evidence.

9. Instructions should lay down the law in the fewest and plainest words, without repetition, and in a consecutive, orderly manner. This court strongly condemns the giving of an excessive number of instructions.

10. In the case presented, while the defendant was not permitted to add an express warranty to her written contract by parol, she had the full benefit of an implied warranty that the barrels in question were reasonably fit for the purpose for which she purchased them.

[Opinion filed December 8, 1888.]

APPEAL from Circuit Court of Winnebago County; the Hon. WILLIAM BROWN, Judge, presiding.

Messrs. N. C. WARNER and J. C. GARVER, for appellant.

Messrs. L. L. MORRISON and A. H. FROST, for appellee.

A person may adopt and use, as indicative of his negotiable and other contracts, a business name or style entirely different from his own proper name, and when he, by himself or a general agent, enters into a negotiable or other contract under such adopted business name, he will be bound by such contract as effectually as though it had been entered into and executed under his own proper name and signature. Vol. 1, Daniel on Negotiable Instruments, 3d edition, Secs. 303, 399 and 399a; Vol. 1, Randolph on Commercial Paper, Sec. 141; Melledge v. The Boston Iron Company, 5 Cush. 158; Medway Cotton Manufactory v. Adams, 10 Mass. 360; Chandler v. Coe, 54 N. H. 561; Devendorf v. The West Va. Oil and Oil Land Company, 17 W. Va. 172; Bishop on Contracts, Ed. 1887, Sec. 1059.

A parol warranty can not be attached to a written contract, and where a written contract contains no warranty it can not be supplied by parol. 2 Benj. on Sales, p. 821, Sec. 942, and note 13; Frost v. Blanchard, 97 Mass. 155; Wenner v. Whipple, 53 Wis. 298, 304; Memain v. Field, 24 Wis. 640, 642; Shepherd v. Gilroy, 46 Iowa, 193; 1 Parsons on Cont., 589, 590; Ostrand v. Reed, 1 Wend. 424; Reed v. Wood, 9 Vt. 285; Dean v. Mason, 4 Conn. 432; Randall v. Rhodes, 1 Curtis, 90.

C. B. SMITH, J. This is an action in assumpsit to recover the amount of twelve promissory notes. Appellee was a cooper in Chicago, and appellant was a distiller in Rockford, Illinois. Appellee had been furnishing whisky barrels, suitable to hold sour mash whisky, to appellant for the years 1883 and 1884, which had proven satisfactory. The barrels furnished for

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these two years were furnished, it is claimed by appellant, under a written contract containing an express warranty. Appellant desired more barrels to hold the same kind of whisky for 1885-6. The distillery was known in a general way as "Graham's Distillery" and was owned and operated by Julia Graham, the wife of Freeman Graham, under the name and style of "Freeman Graham, Agent," and the distillery was managed and run by Byron Graham, son of Julia and Freeman Graham. The reason assigned for adopting the peculiar name under which the business was carried on was out of respect for Freeman Graham, who was then quite an old and feeble man, and who had formerly carried on the business in his own name as the agent of his wife, Julia.

On the 24th day of October, 1885. Byron Graham went to Chicago and called on appellee at his place of business for the purpose of buying barrels for the ensuing fall and winter. After the matter had been talked over, appellee wrote out a proposition, stating the terms and times and manner of payment upon which he would furnish the barrels, and handed it to Byron Graham. The proposition submitted was as follows:

"CHICAGO, Oct. 24, 1885.

"We this day agree to make Graham's Distillery at Rockford, Illinois, all the barrels, half barrels and kegs they may use this season, (and they expect to use about as many as last year,) prices to be for the barrels \$2.65 each, half barrels \$1.90 each, and 10 gal. kegs at \$1.15 each. All delivered on board cars in Chicago. Terms to be notes for equal amounts on each invoice, at 6 mo., 9 mo. and 12 mo., each at 7 per annum.

"JOHN EISZNER."

"The above proposition accepted by us this day, Oct. 24, 1885.

"GRAHAM DISTILLERY,
"Per Byron Graham."

After examining it, Byron Graham wrote on it the following acceptance: "The above proposition accepted this 24th day of October, 1885.

"GRAHAM'S DISTILLERY,
"Per Byron Graham."

The barrels, half barrels and kegs were furnished under this proposition and delivered to the distillery, and received and used for the purpose for which they were made. The barrels were all delivered between the date of the contract and the first of April following, and in such numbers as appellant desired. The notes were executed at the time of their date and signed, "Freeman Graham, Agent," and delivered to appellee. The notes were not paid, and on suit being brought the defendant set up several defenses; at least we are so informed by the argument of appellant's counsel; but none of the pleadings being copied into the abstract we are unable to determine what the issues were, except as we are advised by the argument. We learn, however, from this source, that the execution of the notes was denied under oath, and that numerous pleas purporting to be pleas of failure of consideration were interposed. A trial was had resulting in a verdict for plaintiff for \$1,604.23, and a motion for new trial overruled and judgment on the verdict; and now appellant brings the case here for review. Appellant assigns a great number of errors committed against her. From the imperfect condition of the abstract in this case, we might be well justified in affirming this judgment for want of any way of discovering whether any errors were committed or not, except to go back to the original transcript and there read 651 pages of the original record, which we can not undertake to do. Counsel for appellant makes long and bitter complaint of error committed by the court in settling the pleadings in the case, and insist that the mystification which gathered around court and counsel was denser than the famous "London fogs," and that the confusion of declarations and amended declarations and pleas and amended pleas and demurrers to them all was so great, that no intelligent issue was or could be formed, and that no rational or fair trial was possible in this luckless bed-lem and jargon of special pleading. And yet counsel have not seen fit to copy a single count of the declaration or a single one of her many good or bad pleas, into the abstract, so that we might see, if it were possible through this alleged fog and confusion, whether any error had been committed against appellant in that respect.

We have looked in vain in this abstract for a copy of any of the notes or the contract of October 24, 1885, or any one of the letters written by appellant (with one exception), which he insists should have been admitted in evidence.

But notwithstanding this condition of the abstract, we have given the case a careful and patient hearing upon its merits. It sufficiently appears from the record that the plaintiff finally met the views of the court with a good declaration, and that the defendant at last got the general issue to stick, and then proceeded to the trial. The court permitted everything to go to the jury on the trial, under the general issue, which could possibly have been offered under any proper special plea, and it was a matter of no importance to the defendant what became of her special pleas, so long as she was able to put her entire defense in under the general issue. So that, even if the court committed any error in the pleadings, she has suffered no harm from it, and can not be heard to complain.

Appellant complains that the court erred in admitting the notes signed, "Freeman Graham, Agent," against Julia Graham, the party named in the declaration, and insists that there was a variance. The declaration alleged that Julia Graham executed the notes under the name and style of "Freeman Graham, Agent." The proof is uncontradicted, and is made by Byron Freeman himself, that Julia Graham did carry on the business under the name of "Freeman Graham, Agent," and that he, acting as her agent and manager, so signed the notes in controversy and delivered them to plaintiff. There was no error in admitting the notes under the averment in the declaration. It is well settled that any person may adopt any name, style or signature over which he may transact business and issue negotiable paper and execute contracts, wholly different from his own name, and may sue and be sued by such name, style or signature. *Hynes v. Griffin*, 89 Ill. 134; Vol. 1, *Daniel's Neg. Inst.*, 3d Ed., 303, 399; *Melledge v. Boston Iron Co.*, 5 Cush. 158; *Medway Cotton Factory v. Adams*, 10 Mass. 360; *Chandler v. Coe*, 54 N. H. 561. The notes were properly admitted.

The real defense interposed and urged was one of failure

of consideration. The appellant insists that she had a right to prove by parol an express warranty of the cooperage, and that the court erred in refusing her the right to do so. Appellant offered to prove by Byron Graham what was said between him and appellee at the time of making the contract in writing, October 24, 1885. It was proposed to prove by Graham that an express warranty of the barrels and kegs was then made that they would not leak, and that such warranty was not put in the written proposition and acceptance then entered into by the parties, and under which the barrels were made and delivered. In order to justify this position counsel for appellant claim that the proposition and acceptance was a mere memoranda and not a perfect and complete contract in itself, and that evidence *dehors* may be resorted to for the purpose of adding to it an express warranty. We can not concur in this view. There is nothing incomplete or ambiguous in the proposition made. There was nothing about it that needed any explanation to make its terms intelligible. It had all the elements of a contract except the signature of appellant. When she accepted its terms it then became binding on both parties. There is no rule of law better settled than that which prevents contracts resting partly in parol and partly in writing. Parol contemporaneous understandings which are not included in the writing can not afterward be proven and attached to the writing. This rule is so elementary that it needs only to be stated. *Smith v. Price*, 39 Ill. 28; *Purington v. Northern Ill. R. R. Co.*, 46 Ill. 297.

Nor can a warranty be attached to a written contract by parol. 2 Benjamin on Sales, p. 821, Sec. 942, and note B; *Frost v. Blanchard*, 97 Mass. 155; *Wenner v. Whipple*, 53 Wis. 298, 304; *Shepard v. Gilroy*, 46 Iowa, 193.

Counsel for appellant insist that the case of *Ruff v. Jarrett*, 94 Ill. 475, supports them. We do not think so. The writing in that case claimed to be a contract was clearly no contract, and so the Supreme Court expressly hold. It was a very brief and imperfect memorandum relating to the sale of ice. It did not state the amount sold nor the price, nor to whom sold. It would be utterly idle to contend that such a paper had any

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of the elements of a contract, and that it could be enforced upon its own terms against any one, or for any sum, or for any purpose. It was utterly without any meaning on its face, and so the court held. Nor are the cases referred to by the court in that case analogous to this. Promissory notes do not stand on the same footing with reference to the point here involved, as other contracts in writing, at least so far as the consideration expressed in the note is concerned, and also as relating to the matter of usury. It has always been held that you may show a failure of consideration to a note, or that usury is embodied in it. Simple promissory notes never contain the terms and conditions of contracts out of which they grow. They are but the end and fruit of the contract, and have no reference to anything except the amount and time of payment, and hence where there is no other writing concerning the contract, its terms may be shown by parol. We think no error was committed by this refusal to admit the conversation had at the time of executing the contract.

During the progress of the controversy about the barrels, appellant, by her agent, Byron Graham, wrote certain letters to appellee about the barrels and their condition, and the terms of the contract, and upon the trial of the case offered these letters in evidence on her own behalf, to which objection was made by plaintiff and sustained by the court. The letters were no part of a mutual correspondence by the parties, when the letters on both sides were offered. We are not aware of any rule of evidence under which these letters could be admitted. A party can no more make evidence for himself by writing letters than he can by making oral declarations.

Objection is also made that the court erred in refusing to admit a former written contract for a previous year containing different terms including a warranty between the same parties. We think there was nothing in this objection. While appellant was not permitted to add an express warranty to the written contract by parol, she had the full benefit of an implied warranty. Whether the cooperage was as good as the implied warranty was the real question in the case. The implied warranty required the barrels to be reasonably

fit and proper to hold sour mash whisky. On the trial appellant introduced a large number of witnesses who testified that the barrels, half barrels and kegs all leaked when the warm weather of the summer of 1886 came, and that in consequence of such leakage appellant lost nearly one thousand gallons of whisky, worth from two to three dollars per gallon. This leaking was charged to imperfect workmanship and to unseasoned material in the barrels by witnesses for appellant.

On the part of the defendant a large number of witnesses testified that the barrels were well made and that the material out of which they were made was well seasoned, and had been in store long enough to make it perfectly seasoned, and that there was no defect in the construction of the barrels, or want of dryness in the material entering into the construction. It was also in proof by many witnesses on both sides that no whisky barrel could be made so tight that it would not leak, and that such leakage must be prevented by driving the hoops as the leaks appeared.

It appears also in the evidence from the report of the government gaugers of this whisky, that what is known as "wantage" accounted for fully one half, if not more, of the loss claimed by appellant. "Wantage" covers what is lost by evaporation in the storage of whisky and what soaks into the barrels. This "wantage" increases with the length of time whisky remains in store, and it amounts to so much that the government allows the manufacturer a rebate in his taxes on that account, according to a regular scale of loss according to the time the whisky is stored.

The question as to the condition of the barrels when made, and from the time they were received by appellant until they were used, and during the subsequent summer, and the amount of leakage and "wantage," and the reasons for the same, were all fully and fairly submitted to the jury and considered by them. So far as we are able to see from this record the defendant was permitted to go fully into her defense and to submit every fact to the jury which she was entitled to do under the law, or which she could have given under any special plea

which could have been properly pleaded. Instead of her not having had a fair trial, we think, on the contrary, the fullest indulgence was given by the court to her to make her defense and have it fairly and fully considered by the jury. We can not say that the verdict was not supported by the evidence.

It is next objected that the court erred in giving and refusing instructions prejudicial to appellant. We find the court gave eighteen instructions for the plaintiff and seventeen for the defendant, and refused two for defendant. We shall not stop to discuss this vast mass of instructions in detail. We have examined them and find no substantial error in those given for the plaintiff. Some of them may be open to formal objections, but we find no error of substance.

The first refused instruction for defendant told the jury that if they found the defendant had suffered loss by leakage from these barrels, that he was entitled to have it allowed in this case against the plaintiff. This instruction would have made the plaintiff a guarantor against any and all loss without reference to his implied warranty under his contract. There was no evidence to support the instruction, and it was properly refused. The second refused instruction told the jury that if the barrels were leaking, and that defendant could not have taken the whisky out of the leaky barrels and placed it in other vessels without considerable loss to herself, then she was not bound to do so, but might still recover for such leakage from the plaintiff. We do not think this instruction contained a correct proposition of law. The law will not permit any person to stand by and see his property destroyed or go to waste when, by reasonable exertion and expense, he might save it.

We desire to express our disapprobation of the reckless and utterly useless number of instructions presented to the court in this case by both parties to be passed upon. Such a mass of instructions does not enlighten or instruct a jury, but on the contrary, confuses them and renders the purpose of instructions from the court upon the law of the case utterly null and void. To the jury unaccustomed to legal formula, it must be and can be nothing more than a farce and jangle of jarring

words, rung upon many changes and repetitions until to them it becomes "confusion worse confounded," and if finally their good sense and practical judgment enables them to decide the case correctly it is not because of an unintelligible mass of instructions, but in spite of them. Instructions ought to lay down the law in the fewest and plainest words, without repetition, and in a consecutive, orderly manner. Courts ought not to allow themselves to be used for the purpose of making elaborate arguments to the jury through instructions. The writer of this opinion speaking for himself only, believes it to be the duty of the judges to prepare their own instructions to the jury in the nature of an orderly, direct and simple charge, and with as much brevity as consistent with a correct statement of the law, reserving the right to counsel to submit propositions as they may desire, and have them embodied in the general charge prepared and written by the court, if found correct.

Finding no substantial error in this record the judgment is affirmed.

Judgment affirmed.

PATRICK MORAN
V.
CAROLINE PELLIFANT.

Real Property—Incumbrance Assumed by Grantee—Bill to Compel Performance—Statute of Limitations—Parties—Amount Due—Interest.

1. Upon a bill to require the grantee in a conveyance of real property to pay an incumbrance assumed by him as part of the purchase money, and to recover interest subsequently paid thereon by the grantor, it is *held*: That the alleged ignorance of the defendant is insufficient to overcome the clause in his deed whereby he assumed said incumbrance; that, in the absence of proof to the contrary, he must be regarded as a man of reasonable intelligence and business qualifications; and that the burden was upon him to overcome the evidence of the deed and of the complainant's testimony.

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2. The retention of a portion of the purchase money by the grantee, the deed providing that such sum shall be applied in payment of an incumbrance thereon, which he assumes, constitutes him the grantor's trustee, and he can not plead the statute of limitations to a bill to require him to discharge such indebtedness.

3 A decree will not be reversed for want of necessary parties, unless it affirmatively appears that the party in question was interested in the subject-matter of the suit before the commencement thereof.

4. The statute of limitations of 1872 is inapplicable to a note made in 1869.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Lake County; the Hon. C. W. UPTON, Judge, presiding.

Messrs. JONES & FISHER, for appellant.

Messrs. COOK & UPTON, for appellee.

C. B. SMITH, J. This was a bill brought against Patrick Moran and Peter Connolly in the Lake Circuit Court, by Caroline Pellifant, for the purpose of compelling Moran to pay a certain note of \$400 and accrued interest which he had agreed to pay.

The bill in substance alleges that on the 12th of July, 1869, complainant owned the southeast quarter of the southwest quarter, section 19, town 45 north, range 12 east, in Lake county, Illinois, and that on that day she executed to W. H. Ellis a trust deed on all of said land to secure the payment of her note of that date to Peter Connolly for \$400 and interest at ten per cent. per annum; that said trust deed was recorded in Vol. 35 of Mortgages, on page 78; that on September 14, 1875, the complainant, Caroline Pellifant, sold the east twenty-three acres of the said lands to Patrick Moran for \$1,150; that at that time there was due to Peter Connolly upon the note and trust deed aforesaid, \$400, principal, and \$46.66, interest, which said Moran assumed and agreed to pay as a part of the consideration of the deed to him from Pellifant, but that Moran has not paid the same.

That soon after the execution of said deed from Pellifant to Moran, said Moran induced Peter Connolly to consent to a release of said trust deed as to the twenty-three acres bought by Moran. Said bill makes Patrick Moran and Peter Connolly defendants, and prays for an accounting of the amount due Peter Connolly upon said note, and of the amount of interest thereon paid by Mrs. Pellifant to Connolly upon said note after she sold the twenty-three acres to Moran, and that Moran be decreed to pay the amount due Peter Connolly, and to pay to Caroline Pellifant the amount paid by her to Connolly as interest on said note and interest on said several amounts so paid by her.

The answer of defendant Moran filed March 17, 1888, admits that he purchased the twenty-three acres in question September 14, 1875, for \$1,150, but denies any knowledge of any condition in the deed requiring Moran to pay Connolly \$446.66 as alleged in the bill. Said answer avers that defendant Moran at the time he took the deed from Pellifant, paid her \$700 in cash and gave her two notes of \$225 each, and secured the same by mortgage on said twenty-three acres and that said notes had been paid and satisfied and that the said full purchase price of the twenty-three acres has been paid Mrs. Pellifant by Moran.

The answer also sets up and relies on the ten year statute of limitations, as to any contract to pay the Connolly note, but omits to plead and rely on the said statute as to his alleged liability to pay Mrs. Pellifant the interest she paid on said note, after he had assumed the payment of it.

The case was heard at the March term, 1888, and a decree was rendered in conformity with the prayer of the bill and Patrick Moran was decreed to pay Peter Connolly \$488.66, the amount of principal and unpaid interest then due on said \$400 note, and also to pay Caroline Pellifant \$454, which was the amount of interest she had paid on the \$400 note after Moran had agreed to pay the same, with six per cent. interest on such payments up to the date of such decree. These two amounts were decreed to be liens against the said twenty-three acres in conformity to the prayer of the bill. Defend-

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ant Moran now appeals to this court and brings the record here for review and insists that the decree is erroneous in finding him liable to pay said money or any part thereof. Peter Connolly made no defense as no relief was asked against him, and as to him a default was entered.

Defendant Moran admits buying the land and that he was to pay \$1,150 for it, and insists that he has fully complied with his undertaking. He testifies that at the time the purchase was made he paid cash down \$700 and gave two promissory notes for \$225 each, making the sum of \$1,150, and that he executed his mortgage to secure the notes, and has since paid both of said notes and had his mortgage released. On the contrary, complainant testifies that he only paid cash down \$300 and executed his two notes for \$225 each, making in all \$750 to be paid her, and that he assumed the \$400 note and mortgage due Peter Connolly and that the agreement was put in the deed given him. She also testifies that after assuming the payment of the note the defendant did not either pay the note or the accruing interest, and that Connolly kept demanding the interest of her and that she kept paying it until July 12, 1885.

The sale was made to defendant Moran September 14, 1875. Her only explanation for paying interest on this note after Moran had agreed to pay it, is, that Connolly kept demanding it from her and that Moran did not pay it and that she knew nothing of Moran. There is no proof that she ever demanded that Moran should pay the note and interest until she brought this bill. Moran and his daughter both testify that they went to complainant's house and asked her what she sued him for, and that she then admitted that Moran had paid her \$700 cash, but complainant testifies in reply to this, that what she said and meant on that occasion was, that the \$700 included the two notes of \$225 each.

The agreement on the part of appellant to pay the note given Connolly was recited in the deed from appellee to him as follows:

“This conveyance is made subject to the payment of a certain note made and executed by Caroline Pellifant to Peter

Connolly for the principal sum of four hundred dollars, dated July 12, 1869, and secured by trust deed of that date to Warren H. Ellis, as trustee, which deed is recorded in Lake county, in Vol. 35 of Deeds, page 78. Upon said note there is now due the sum of four hundred and forty-six dollars and sixty-six cents, which the grantee herein is to pay and discharge as part and parcel of the consideration of this conveyance."

The defendant seeks to avoid the force of this provision in his deed by saying that he did not know it was in his deed, and that he did not read his deed and had it recorded without reading. In the absence of proof to the contrary we must treat defendant Moran as a man having reasonable business qualifications and of reasonable intelligence. In the light of this presumption and the evidence in the case, we regard his explanation of this clause in the deed as wholly insufficient. He does not deny that Brown drafted the deed which he accepted, and the mortgage which he gave. It is unreasonable to suppose that he bought this land at \$50 per acre without knowing anything about the title or having made any examination of the record. He himself says that he and Connolly called on plaintiff a few days before the purchase and talked with her about it. In a few days after he got this deed he went to Connolly and procured the release of Connolly's mortgage as to that twenty-three acres, leaving it all in force as to the other seventeen acres which complainant had not sold. These facts alone create a very strong presumption that he knew before and after he bought the land that this mortgage was on it, and to suppose with this knowledge he would buy the land and pay the full purchase price for it with the incumbrance still on it, would do violence to his intelligence and be utterly inconsistent with the ordinary methods of transferring titles.

Nor is it consistent with reason or common experience that men accept deeds without reading them or having them read to them and so not knowing what land or what title they are getting or what incumbrance they are assuming. If the testimony of defendant is to be relied on, then he simply gave \$1,150 for

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this land, neither knowing nor caring what title he got nor with what incumbrance it was burdened. But upon these points he is directly contradicted by complainant, who swears he did know of the incumbrance, and that he did assume it and agree to pay it as a part of the purchase money; that he has not done so; that he did read the deed, or that it was read to him, and that he knew its covenants.

But the deed itself is the best evidence of the contract, and is infinitely stronger than the recollections of parties after the lapse of twelve years, however honest they may be. It would be a most reckless and dangerous proceeding to allow parties to come into court and swear away their own solemn admissions and contracts in deeds, years after they have been made.

If this could be done, no covenant in a deed would be safe either against cupidity or forgetfulness. If, in fact, any mistake was made in this deed, and this burden of paying the \$400 note wrongfully imposed on the defendant, he knew very soon afterward, when he got Connolly to release the mortgage as to that land, that such provision was in the deed, and it was his duty then to have asked complainant to correct the mistake; and, failing in that, he should have appealed to a court of equity to reform the deed when facts were all fresh in the minds of the parties. The only fact militating against complainant's claim is the fact that she continued to pay interest on this note annually for about ten years after the date of the deed, and without asking the defendant to do it, or to pay the note.

This circumstance is not without force. But the force of it is much weakened when we remember that the mortgage was still an incumbrance on her remaining seventeen acres, and to protect it she must see to it that the interest or note was paid. Connolly made his demand against her annually for his interest. Connolly had, by his own wrongful act, released Moran, or at least released his mortgage on Moran's twenty-three acres, and, so far as it was in his power, threw the whole burden of the mortgage on Mrs. Pellifant's seventeen acres. She swears that she knew nothing about Moran after he paid the two notes made to her. She was an old palsied woman, weakened

in body and mind, as the nature of her affliction would indicate. We can not hold that this circumstance is of sufficient force of itself to overcome the conclusive evidence in this record of the defendant's liability. When the plaintiff produced the note and the deed, she made a *prima facie* case, and the burden was then shifted on the defendant to show payment and to overcome the evidence of the deed and plaintiff's own testimony. This he failed to do.

Defendant pleads the ten year statute of limitations, approved April 4, 1872, and pleads it to the note itself. Nothing is said in his plea or answer as to any bar for interest paid by Mrs. Pellifant. The \$400 note was made on July 12, 1869, and was governed by the sixteen year statute of limitations.

The plea of the statute of limitations meeting no claim presented by the complainant in the proof, calls for no further discussion. We will say, however, that even if the proper statute had been pleaded, and to cover the whole claim, it can have no application to this case under the authority of *C. & E. I. R. R. Co. v. Hoyt et al.*, 119 Ill. 493. The defendant by his agreement became a trustee for complainant and could not plead the statute of limitations.

The defendant also insists that one Peter Smith, who now claims to own this twenty-three acres of land, should have been made a party to the suit, and that, he having an interest in the land, it was error to decree the sum found due a lien on the land without having made him a party to the suit.

This position would be correct if the record showed that he bought the land before the commencement of the suit, but it does not. If he bought after the commencement of the suit he is not a necessary party. A party can not buy into a law suit and thereby make himself a necessary party. We can not reverse this decree for want of necessary parties, unless it affirmatively appears they are such.

The only remaining point urged against the decree is that the court erred in computing the amount due, and that the decree is in excess of the amount actually due. We do not find the court erred in its calculation or in stating the account,

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which was done by agrément of the parties. Finding no error in the record, the decree of the Circuit Court is affirmed.

Decree affirmed.

Mr. Justice UPTON took no part in this case, having tried the case below.

THE PEOPLE EX REL., ETC.,
V.
JAMES J. CONNELL.

Quo Warranto—Eligibility to Office of County Judge—Citizenship—Domicile—Change of—Art. 6, Sec. 17, Constitution of Illinois—Evidence.

1. To effect a change of domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home.

2. A husband may go to another State in quest of health for his wife and remain a considerable length of time without losing his residence in this State.

3. In a proceeding by *quo warranto* to test the right and eligibility of the relator to the office of county judge, under Art. 6, Sec. 17, of the Constitution of this State, it is *held*. That the election and commission of the relator raise a strong presumption of his eligibility; and that the evidence does not overcome this presumption.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Mercer County; the Hon. GEORGE W. PLEASANTS, Judge, presiding.

Mr. JOHN C. PEPPER, for appellant.

“If a person has actually removed to another place with the intention of remaining there for an indefinite time, and as a place of fixed, present domicile, it is to be deemed his place

of domicile, notwithstanding he may entertain a floating intention to return at some future period." Story on Conflict of Laws, par. 41, 42, 46 and 47. See also Hart v. Lindsey, 17 N. H. 295; Hairston v. Hairston, 27 Miss. 704; Warren v. Thomaston, 43 Maine, 406; Gilman v. Gilman, 55 Me. 165; Shelton v. Tiffin, 6 How. 163; Frost & Dickinson v. Brisbin, 19 Wend. 11; Whitney v. Sherborn, 12 Allen, 111; Colton v. Longmeadow, 12 Allen, 598; Holmes v. Greene, 7 Gray, 299; Pitman v. Johnson, 10 Mass. 488; Thayer v. Boston, 124 Mass. 132; Lyman v. Fiske, 17 Pick. 234; State v. Groome, 10 Iowa, 308; High's Appeal, 2 Doug. 515; Ringgold v. Bailey, 5 Md. 186; Hood's Estate, 21 Pa. State, 106; Kashaw v. Kashaw, 3 Cal. 312; Smith & Armistead v. Croom et al., 7 Fla. 81; Board of Supervisors v. Davenport, 40 Ill. 197.

Lord Campbell in the case of Aikman v. Aikman, 3 Macq. H. L. Cases, 203, tersely gives the law as follows: "If a man is settled in a foreign country in some permanent pursuit requiring his residence there, a mere intention to return on a doubtful contingency will not prevent such residence in a foreign country from putting an end to his domicile of origin."

Messrs. SWEENEY & WALKER, for appellee.

The term "residence" in its legal use has a more or less restricted meaning, according to its application. Generally it signifies what we understand by the home—domicile—the permanent abode where one lives without any present and absolute intention to change it and to which, whenever absent, he intends to return. Hays v. Hays, 74 Ill. 314; Dale v. Irwin, 78 Ill. 181.

The Constitution, with reference to eligibility for office, contemplates a residence which is equivalent to home—domicile—permanent abode. This is apparent from the length of time prescribed. Smith v. The People, 44 Ill. 16; Wilkins v. Marshall, 80 Ill. 74; Johnson v. The People, 94 Ill. 512. Residence and domicile are equivalent terms. McDaniel v. King, 5 Cush. 472; Smith v. Smith, 98 Mass. 160; Hays v. Hays, 74 Ill. 312; Love v. Cheney, 24 Iowa, 284; Hall v. Hall, 25 Wis.

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607; Kellogg v. Supervisors, 42 Wis. 106; Wal'ace v. Lodge, 5 Brant. 507; Hallett v. Bassett, 100 Mass. 107; Harvard Coll. v. Gore, 5 Pick. 370; Spragins v. Houghton, 2 Scam. 396; Supervisors v. Davenport, 40 Ill. 197; Thornlyke v. Boston, 1 Met. 242; Sears v. Boston, 1 Met. 250; Gilman v. Gilman, 52 Me. 165.

Domicile or residence, once established, continues until abandoned and another of like character acquired in its stead. Hays v. Hays, 74 Ill. 314; Jemison v. Heapgood, 10 Pick. 77; Glover v. Glover, 18 Ala. 365; Hardy v. DeLeon, 5 Texas, 211; Leach v. Pillsbury, 15 N. Y. 137; Kilburn v. Bennett, 3 Met. 199; Sacket's Case, 1 Mass. 58; Alington v. Boston, 4 Mass. 312.

A change can only be effected by the union of intention and act. Smith v. People, 44 Ill. 16; Smith v. Croom, 7 Florida, 149; Desmare v. United States, 93 U. S. 605; Mitchell v. United States, 21 Wall. 350; C. & N. W. R. R. Co. v. United States, 117 U. S. 123.

It is a question of intention from all the facts and circumstances in the case. Kitchell v. Burgwin, 21 Ill. 44; Ives v. Mills, 37 Ill. 75; Walters v. The People, 21 Ill. 178; Smith v. The People, 44 Ill. 16; Smith v. Croom, 7 Florida, 200; Shaw v. Shaw, 98 Mass. 158; Hays v. Hays, 74 Ill. 312.

Conditional change on account of climate or other reason does not forfeit residence. Smith v. People, 44 Ill. 16; Wilkins v. Marshall, 80 Ill. 74; Kitchell v. Burgwin, 21 Ill. 40; Potts v. Davenport, 79 Ill. 45.

Declarations by a person relative to residence are admissible when made in and about his departure or in and about his going, or his remaining or returning. Wallace v. Lodge, 5 Ill. App. 507; Thompson v. Homestead, Sec. 269; Drake on Attachment, Sec. 54; Forbes v. Forbes, Kay, 341; Isham v. Gibbons, 1 Bradf. 69; Elder v. U. S. Ins. Co., 16 Johns. 128; Miner v. Clark, 33 Vt. 60; Fish v. Chester, 8 Gray, 50; Dupins v. Wartz, 53 N. Y. 556; Kilburn v. Bennett, 3 Met. 199; Gurgor v. Clark, 3 Ind. 250; Gilman v. Gilman, 52 Me. 165; Heill v. Crowley, 26 How. 413.

C. B. SMITH, J. This is a proceeding in *quo warranto*, brought by the people on relation of J. H. Ramsey against J. H. Connell to test his right and eligibility to the office of county judge of Mercer county, Illinois, to which he was duly elected at the November election, 1886.

The petition charges that the respondent intruded into and usurped the office of county judge of said county.

The respondent denies the allegation in the petition, and in his plea sets up his right to the office. No question is made by the relator as to the legality of the election, nor that respondent did not receive a majority of the votes. The only question raised is as to the eligibility of the respondent.

Sec. 17, Art. VI, of the Constitution of Illinois, provides that, "No person shall be eligible to the office of judge of the Circuit Court or any inferior court, unless he shall be twenty-five years of age and a citizen of the United States, nor unless he shall have resided in the State five years next preceding his election, and a resident of the circuit in which he shall be elected."

The petition alleges that the respondent had been a resident of Mercer county for many years, and that in the spring of 1882 he closed up all his business here, sold his home and moved with his family to the State of Colorado, went into business there and became a permanent resident of that State, and remained there until February, 1884, and that in that month and year he again returned to Illinois and was elected to the office of county judge in November, 1886, but that he was not qualified to hold that office by reason of not having been a resident of the State five years next before his election.

It is conceded that respondent left this State in 1882, and that he remained away substantially all the time until 1884; that he sold his property here, and upon his arrival in Colorado he formed a co-partnership in Pueblo for the practice of law, and that he was admitted to the bar there, after making an affidavit that it was his intention to become a citizen of that State; that after the dissolution of his first partnership he formed another partnership for the practice of law and con-

tinued in that relation for about a year; that during the time of his absence he in fact practiced law in the courts as a resident attorney, and to all appearances a permanent citizen and resident of Colorado. The petition relies on these admitted facts as being conclusive against the respondent's citizenship and residence in this State for the required length of time to entitle him to hold the office.

While the respondent admits the foregoing facts, he denies these conclusions against him, and denies that it was ever his intention to abandon his residence in this State, except on the condition that it should be found that his wife's health could be permanently improved by a residence in Colorado, and also that it should be further ascertained that she could not safely return to Illinois. It appears from the proof that the respondent's wife's health was in a failing condition. She had been receiving medical treatment in Quincy, but without benefit, and had returned home. Her husband and family became alarmed at her condition, and the advice of the family physician was sought. He did not think she could live in Illinois, and advised a visit of at least two years' length to Colorado, then supposed to have a climate favorable to those having pulmonary trouble. But Colorado was a long way off, and respondent was not willing to send his wife so far away alone, in her feeble condition. She needed his care and society, and he finally determined to sell out and go with her, and make a trial of the climate on his wife's health, and if it should prove permanently advantageous to her, and it should not be safe for her to return to Illinois, then he should make Colorado his permanent home; otherwise he should return to Illinois. Before and about the time he left he declared on many occasions and to many different persons, both orally and by letter, that his trip west was to be only experimental and his stay conditional, depending on his wife's health. On his way to the west he stopped at different places and made the same statement to his friends whom he visited on the road. After he went to Colorado he wrote letters to the same effect. On different occasions while in Colorado he refused to vote, although being pressed to do so, placing his refusal on the

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ground that he was not entitled to vote, and that he did not desire to put himself in an attitude to lose his residence in this State.

Respondent swears that it never was his intention to permanently abandon his residence in Illinois, unless the requirement of his wife's health made it necessary for him to do so, and that that was the sole condition of his remaining away. After being there about two years he was advised by his wife's physician that she had realized all the benefit from the Colorado climate which she was likely to receive, and it was thought she might safely return to Illinois. Some time after this communication to him, he and his wife were called back to Aledo, Illinois, their former home, on account of the death of his wife's father. After a somewhat protracted visit, it was thought that his wife might again safely live in Illinois. She then remained here through the winter, and seemed to suffer no inconvenience from the climate. It was then decided that she should remain here and respondent go back to Colorado and close up his business, which he did, and then returned again to Illinois. A great deal of testimony was taken on the trial concerning the declarations and acts of respondent, which we shall not attempt to go over or to discuss in detail. After a careful consideration of all the evidence, we are satisfied that the relator entirely failed to establish the charge of ineligibility, and that the respondent furnished satisfactory proof that he never did form a settled purpose to abandon the State, but that it was all the time his intention to return to Illinois upon the restoration of his wife's health. This purpose was declared by him long before there could have been any purpose on his part to manufacture testimony for himself. Upon questions of residence the acts and conduct of a party are always entitled to great weight, but they are not conclusive. These acts may be explained by his declarations at the time of doing the acts as parts of the transaction, so that from the acts and declarations made when there can be no purpose or object to fabricate evidence, the real intention of the party may be ascertained.

The acts done by respondent in this case, unexplained, would

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certainly make a strong case against him, but the explanation for all these acts seems to us to be fair and reasonable, and consistent with a purpose not to abandon his home in Illinois unless the requirements of his sick wife should make it necessary for her to remain permanently away from her old home and her family. We hold that a husband may go from one State to another in quest of health for his wife, and remain there a reasonable length of time for that purpose, without losing his residence. Great stress is laid by the relator upon the fact that respondent sold all his property in this State, and upon reaching Colorado bought him a library suitable for the demands of the practice in that State, and that he did go into business there and engaged in the practice of his profession. Respondent says he was compelled to do these things to provide means to support himself and wife while living there. This action being of a criminal nature, the proof of usurpation must be clear and satisfactory. *Smith v. The People*, 44 Ill. 16.

The election and commission of relator raise a strong presumption of his eligibility, which must be overcome by the proof. *Smith v. The People*, 44 Ill. 16. "To effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home." *Hays v. Hays*, 74 Ill. 312. Under the last above rule laid down, we think the proofs fail to show that the relator ever gained a permanent residence in Colorado, or that he lost his residence in Illinois.

We think the finding and judgment of the court below was correct, and the judgment is affirmed.

Judgment affirmed.

28 292
67 576

W. H. TRUESDELL

V.

W. F. HUNTER.

Principal and Surety—Note—Extension—Pleading—Discretion as to Order and Time—Burden of Proof—Affidavit of Merits—Motion to Strike Pleas from Files.

1. The order and time of pleading rests in the sound discretion of the trial court, and the action of that court is not subject to review, unless it appears that such discretion has been improperly exercised to the prejudice of the party complaining.

2. An extension of time that will operate to release a surety on a promissory note must be for a definite time, without the consent of the surety, and upon a new and sufficient consideration.

3. In an action against a surety on a promissory note, the burden of proof to support pleas of alteration and extension is upon the defendant.

4. Where an affidavit of merits is attached to the declaration, the defendant has no right to file pleas without an affidavit of merits.

5. In the case presented, the affidavit attached to the general issue, putting in issue the signature of the note, was not such an affidavit of merits as the statute requires, and the court should have allowed the plaintiff's motion to strike the pleas from the files.

[Opinion filed December 8, 1888.]

APPEAL from the City Court of Elgin County; the Hon. A. H. BARRY, Judge, presiding.

Messrs. R. M. IRELAND and JAMES COLEMAN, for appellant.

While it is, no doubt, law, that if the creditor, by a valid and binding agreement, without the assent of the surety, gives further time to the principal, the surety is discharged, yet it is equally the law that "mere passiveness or delay in proceeding against the principal will not discharge the surety." *Pearl v. Welman*, 11 Ill. 352. "All that a surety has a right to require of a creditor, in the absence of a statute provision, is that no affirmative act be done that will operate to his prejudice." *Villars v. Palmer*, 67 Ill. 204. "To discharge a

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surety by reason of an extension of the time of payment, there must not only be a sufficient consideration, but the time must be definitely fixed." *Gardner v. Watson*, 13 Ill. 347.

The extension of time of payment, even for a definite period, leaving the rate of interest the same, has never, so far as we are aware, been held to be a contract founded on a sufficient consideration to be valid, and to release the surety. In the case of *Dodgson v. Henderson*, 113 Ill. 364, the Supreme Court has pushed the principle to the farthest verge of which we know, when they say that if the time of payment is extended to a definite time, and the principal debtor agrees to keep the money that time, and pay the interest promptly at the expiration of the time, there is a sufficient consideration for the promise to extend the time of payment, and the surety will be released.

The statute requires that the defendant "shall file with his plea an affidavit stating that he verily believes he has a good defense to said suit upon the merits, to the whole, or a portion of the plaintiff's demand," etc. Sec. 37, Practice Act. If there had been no plea but that of the general issue filed, the statute might have been substantially satisfied; but there was a special plea also on file, and the effect of a verification simply of the plea of the general issue would be to swear that he, the defendant, had a good defense, such as might be made under the general issue, but would necessarily exclude any verification of a defense to be made under a special plea. An affidavit in conformity with the statute would have covered any defense that could have been made under either the plea of the general issue or any special plea. But the defendant having seen fit to confine his verification simply to the general issue, the special plea not being verified in fact nor even by implication, he should have been confined to a defense under the general issue, and the special plea should have been stricken from the files upon the plaintiff's motion. The court's refusal to do so, we submit, was error. "Where the statute requires plea to be accompanied by affidavit of merits, a plea unaccompanied by such affidavit should be stricken from the files." *Filkins v. Byron*, 72 Ill. 101.

Messrs. J. A. RUSSELL and H. B. WILLIS, for appellee.

The appellant contends that it was error on the part of the trial court to permit the filing of such plea by the defendant Hunter. We believe it has been uniformly held by the Supreme Court of this State, that the granting of such leave is a matter which rests in the sound discretion of the court and can not be assigned for error except upon an apparent abuse of such discretion by the court. *Drake v. Drake*, 83 Ill. 526; *Knickerbocker Ins. Co. v. McGinnis*, 87 Ill. 70.

The law is well settled that any alteration of a note, however slight, by one having an interest therein, which changes the terms of the contract, will avoid the note or instrument thus altered, if made after the delivery of the same, without the knowledge or assent of the makers. *Gardiner v. Harback*, 21 Ill. 129; *Benedict v. Minard*, 58 Ill. 19; *Burwell v. Orr*, 84 Ill. 465; *Kelley v. Trumble*, 74 Ill. 428.

A successful defense could be made to the note in question by the defendant, Hunter, on account of such alteration, and the leave was properly granted.

C. B. SMITH, J. This was an action of assumpsit on the following note:

"\$250.

ELGIN, Dec. 13, 1880.

"On or before one year after date we, or either of us, promise to pay to the order of W. H. Truesdell \$250, at the Home National Bank of Elgin, value received, with interest at 8 per cent. per annum.

"No. 531. Due Dec. 13, 1881.

"G. H. SHERMAN,

"WM. F. HUNTER."

Hunter alone was served and the case was tried as to him.

The defendant first pleaded the general issue and one special plea, setting up that he signed the note as surety and that the payee had extended the time for payment one year to the principal debtor for a consideration without the knowledge or consent of this defendant, wherefore he was discharged, etc.

After the pleadings were in this condition, defendant asked and obtained leave to withdraw the general issue for the purpose of obtaining the opening and closing before the jury. The cause then proceeded to trial and Hunter was placed on the stand to prove his signature, and then he stated that he signed the note, but that the note had been altered since he signed it, and that the words "*on or before*" had been added and the words "*or either of us*" had been interlined since he signed it.

The defendant then asked and obtained leave to file another plea denying the execution of the note, and then filed the general issue sworn to against the objection of the plaintiff.

The trial then proceeded resulting in a verdict for defendant. A motion for new trial was overruled and judgment rendered on the verdict against the plaintiff. The plaintiff brings the case here on appeal and asks for a reversal of the judgment and assigns the usual errors.

The plaintiff complains of the action of the court in first allowing the general issue to be withdrawn and then allowing it to be again filed so as to put the signature and alleged alteration of the note in issue. In this there was no error. The order and time of pleading rests in the sound discretion of the court and is not subject to review by this court unless the court can see that the discretion has been improperly exercised to the prejudice of the partly complaining. Upon this issue made on the alteration of the note by the sworn plea of the defendant, we think the proof fails to show the alteration.

The charge in the plea amounts to a charge of forgery and the burden is on the defendant to establish the charge. The plaintiff positively denies it, and all the evidence in support of the plea is of a very uncertain and unsatisfactory character. But we think the changes charged to have been made in the note are immaterial and presented no defense, even if they had been made.

The legal aspect of the note was not changed. The alleged changes gave the plaintiff no right he did not before have nor cast any additional burdens on the makers of the note.

We think the defendant also failed to establish his defense

made under his special plea which set up an extension of time. To make this defense availing and successful it is the settled law of this State that there must be a new, valid and binding contract between the payee and principal maker of the note (without the consent of the surety), capable of legal enforcement. The time for which the extension is made must be a part of the agreement and fixed, and it must be upon a sufficient consideration. This was held in *Gardner v. Watson*, 13 Ill. 347.

Counsel for appellee contend that this rule is relaxed in *Dodgson v. Henderson*, 113 Ill. 360, but we do not think so. On the contrary, we think the facts in the case come fully within the rule laid down in *Gardner v. Watson*, *supra*.

The time for which the extension was made was definitely fixed to a certain day named and the maker agreed to keep the money until that time and to pay the interest annually.

The agreement to extend to a certain day on the one hand and the agreement to keep the money until that day by the other party, was a valid and binding agreement capable of enforcement by either party, and the agreement to pay the interest annually, which was not expressed in the note, was a sufficient consideration to support the mutual promises even if such consideration was needed to support the mutual promises. Now, do the facts established by the proof in the case at bar bring this case within the rule? We think not. Upon appellee's own testimony there is a clear failure to show that, even if the time was extended to a definite date, he had agreed on his part to keep the money or to do anything, in fact, except what the note already required him to do. But, even upon the point of fixing any day or time to which the extension was made, appellee's own testimony is too indefinite and uncertain to establish that point in his favor. His statements are directly contradicted by appellant as to any definite time being fixed for the extension.

The burden of proof was on appellee to support this plea upon all its material averments and we think he failed to do so.

Appellant alleged error in the action of the court in refusing to strike appellee's pleas from the files on his motion, for

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want of an affidavit of merits to his pleas. The declaration had the common counts and an affidavit of merits attached.

Under the statute the defendant had no right to file pleas without an affidavit of merits on his part. The affidavit attached to the general issue putting in issue the signature of the note was not such an affidavit of merits as the statute requires. The court should have allowed appellant's motion to strike these pleas from the files and in failing to do so there was error. For this error the judgment is reversed and the cause remanded.

Reversed and remanded.

W. W. SALSURY
V.
HENRY FALK.

28	297
62	117

Pleading—Sufficiency of Plea Charging Fraud—Public Lands—Entry—Application.

1. Pleas charging fraud must state clearly and specifically the facts done or omitted which are supposed to constitute such fraud.
2. In the case presented, the court below properly sustained a demurrer to the plea to the effect that the money sought to be recovered was advanced to the defendant for performing certain illegal services, there being a failure to state facts involving the parties in any wilful fraud.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Livingston County; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. STRAWN & PATTON, for appellant.

All persons are conclusively presumed to know what the law requires. In legal contemplation, appellee knew a fraud was being committed against the laws of the United States, and knew he was paying out \$250 to appellant for assisting him in such fraudulent transaction.

Appellee can not plead ignorance of the law. *Elliott v. Swartwout*, 10 Pet. 137; *Mowatt v. Wright*, 1 Wend. 355; *Branham v. San Jose*, 24 Cal. 585; *Silliman v. Wing*, 7 N. Y. 159.

The want of a consideration is of no avail against an executed contract. *Maxwell v. Graves*, 59 Iowa, 613.

An agreement to do an illegal act can not be enforced by either party. *Bishop on Contracts*, § 467.

But the voluntary performance of the illegal agreement by both parties places them, in effect, in the same position as if the original contract had been good; the law will help neither. *Greenwood v. Curtis*, 6 Mass. 358; *Morris v. Hall*, 41 Ala. 510; *Green v. Hallingsworth*, 5 Dana, 173; *Myers v. Meinrath*, 101 Mass. 366; *Jacobs v. Stokes*, 12 Mich. 381; *Liners v. Hesing*, 44 Ill. 113; *Arter v. Byington*, 44 Ill. 468.

Messrs. N. Q. TANQUARY and McILDUFF & TORRANCE, for appellee.

If the plea stated facts showing the transaction between plaintiff and defendant was an illegal one or prohibited by law, it shows that defendant was only acting as the agent of Charles A. Florence, of Chicago. The plea does not show that the defendant had paid the money over to his principal. Under the law, even though the transaction was a fraudulent one—one in which the law would help neither of the parties if completed—yet, where one of the parties to the transaction rescinds, as he may do while the money is in the hands of the agent, he can maintain an action to recover the money back from the agent. To permit this, say the courts, “is merely to allow a *locus pœnitentiæ*, and to prevent the illegal contract from being executed at all.” *Merryweather v. Nixon*, 2 Smith’s Lead. Cas. 7th Am. Ed. p. 479, and notes thereto; *Knowlton v. Empire Spring Co.*, 14 Blatch. 364; *White v. Franklin Bank*, 22 Pick. 189; *Adams Express Co. v. Reno*, 48 Mo. 264; *Hooker v. DePalos*, 28 Ohio St. 251; *Edgar v. Fowler*, 3 East, 225.

By pleading this special plea the defendant must show clearly that the plaintiff is debarred from recovering from

Salsbury v. Falk.

him, upon grounds of public policy, the money he admits he secured. He is entitled to no consideration or protection at the hands of the court. The reason of the law is better and broader than that. It is the benefit of the public, and not the advantage of the defendant to an action, that is to be considered in cases in which one or more of several parties *in pari delicto* rely for defense upon the illegality of the transaction out of which the claim arises. In such cases the presumption is in favor of the transaction, and if it be susceptible of two meanings, one legal and the other not, that interpretation will be put on it which will support and give it operation. *Lewis v. Davison*, 4 Mees. & W. 654; *Mittelholzer v. Fullerton*, 6 Q. B. 989; *Biel v. Miller*, 11 Bush. 306.

In order to make a contract unlawful, as being against public policy or law, it must be manifestly or directly so. It is not sufficient that the contract is connected with some violation of law remotely or indirectly. *Bier v. Gratt*, 24 Gratt. 1.

C. B. SMITH, J. This is an appeal from the Circuit Court of Livingston. The action is assumpsit on the common counts. The plaintiff sought to recover only on a claim for money advanced to the defendant for his use.

The defendant pleaded a special plea, setting up that the money was advanced to him by plaintiff for the purpose of paying him for performing certain illegal services for the plaintiff. The defendant afterward obtained leave to amend this plea, the amended plea being as follows:

“And now comes the defendant, by Strawn & Patton, his attorneys, and defends the wrong and injury, when, etc., and says that the plaintiff ought not to have his aforesaid action, because he says that the claim of the plaintiff under said declaration and bill of particulars filed herein is for money paid to the defendant by plaintiff, at his request, and defendant avers that said money was paid to him by the plaintiff for the purpose of procuring an entry of 160 acres of government land located in the State of Nebraska, under the timber culture land laws of the United States, by means of a written application signed by the plaintiff in the State of Illinois, the

same never having been sworn to by said plaintiff before the register or receiver of the land office or the clerk of a court of record, or other officer authorized to administer oaths in the government land district where the said land was situated; nor did the defendant know the law required said written application to be sworn to; and defendant avers that said blank application was forwarded to him by Charles A. Florence, of Chicago, Illinois, and that he procured the signature of plaintiff thereto and returned the same to said Florence, and by that means defendant procured from the register the receipt for the payment of the government fee provided under said laws, the plaintiff well knowing, at the time he signed said application, that he was not to swear to the same, and further knowing, at the time he received said receipt, that he had not made an affidavit to the facts set out in said application, as required by law. And defendant avers that for such illegal service he received from the plaintiff the money now sought to be recovered back in this action. And this the defendant is ready to verify, wherefore he prays judgment," etc.

A demurrer was entered to this plea by appellee, and sustained by the court, and appellant abiding by his plea, and there being no other plea on file, a jury was called to assess the damages, which they did at \$250.

After overruling a motion for a new trial, the court gave judgment on the verdict; and appellant brings the case here on appeal and assigns for error the action of the court in sustaining the demurrer to his amended plea.

We think the demurrer was properly sustained, and that there was no error in so doing. The plea entirely fails to set up any such state of facts as involved either the plaintiff or the defendant in any wilful fraud upon the government. It was probably the intention of the pleader to do so, but he signally failed. The plea seems to be unintelligible. It is certainly wanting in every element of a good plea charging fraud. Pleas alleging fraud must state clearly and specifically the facts done or omitted which are supposed to constitute the fraud, so that the court may determine from the facts stated whether or not a fraud has been committed, and so that the

Vanscoy v. Bigelow.

party charged with the fraud may know what acts and facts are alleged against him, and be prepared to deny them in his replication and meet them on the trial.

The plea being bad in all these respects, the demurrer was properly sustained, and the judgment is affirmed.

Judgment affirmed.

G. W. VANSKOY
V.
C. L. BIGELOW ET AL.

Replevin—Sales—Delivery of Possession—Sufficiency of—Instructions—General Objections.

28 301
59 91

In an action of replevin to recover a coal office, shed and scales taken under an execution against a third person, it is *held*: That the transfer of the property to the plaintiffs upon a sale before the levy of the execution was not fraudulent, the possession taken being sufficient in view of the nature of the property sold; and that, in the absence of specific objections, no error in the instructions appears.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Livingston County; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. STRAWN & PATTON, for appellant.

Messrs. H. H. McDOWELL and A. E. HARDING, for appellees.

C. B. SMITH, J. This suit is in replevin and brought by appellee against appellant, charging him with wrongfully taking from appellee one coal office, one coal shed and one four-ton Howe scales. Vanscoy was a constable and took the property from appellees by virtue of an execution in his hands, issued upon a judgment rendered by a justice of the peace

against one John W. Eagle, in favor of Richard Evans, October 24, 1887, for \$200. The execution was issued on the same day the judgment was rendered. Appellees bought the property in good faith and for a valuable consideration November 3, 1885, long before the debt upon which judgment was taken had any existence. Appellant charges no fraud nor want of sufficient consideration in the transfer and sale from Eagle to appellees, nor does he claim he had any debt against Eagle at the time of the sale, nor that he afterward trusted Eagle on the supposition that Eagle owned the property in controversy. The only point he makes is that the delivery of the property to appellees by Eagle, was not sufficient to invest them with title as against creditors. The verdict and judgment was for appellee.

The facts about the delivery are that after appellee purchased the property and assumed the payment of two chattel mortgages, amounting to about \$451, appellees and Eagle went to the coal sheds and coal office, and the keys were delivered to appellees and possession taken, and the keys thus delivered were within an hour again delivered to Eagle, who appears thereafter to have had possession for appellees.

Appellant now contends that this transfer is fraudulent, and that no sufficient evidence of delivery was shown to be valid against creditors. We think that the possession taken was all the law required, considering the nature of the property transferred and sold, and that it was sufficient to transfer the title to appellee.

Appellant complains that the instructions were erroneous but points out no specific error, nor does he state in which of the numerous instructions given, the error, whatever it is, may be found.

We have been unable to find any error in the instructions or the record, and the judgment will be affirmed.

Judgment affirmed.

Ribordy v. Pellachoud.

FERDINAND RIBORDY
V.
ALEXIS PELLACHOUD.

Waters—Drainage over Another's Lands—Ditch—Instructions—Prescription.

1. In an action to recover damages for closing a ditch and thereby flooding the plaintiff's land, it is *held*: That an instruction touching the plaintiff's right to drain his land into a natural channel or depression was defective in not stating the hypothesis that, in order to justify the plaintiff in throwing water upon the defendant's land, there must be a natural channel, depression or outlet thereon; and that an instruction touching the question of prescription, was erroneous.

2. One can not acquire a prescriptive right to flow another's land by the acquiescence of the latter for "several years."

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Livingston County; the Hon. N. J. PILLSBURY, Judge, presiding.

Messrs. McILDEFF & TORRANCE, for appellant.

Messrs. STRAWN & PATTON, for appellee.

C. B. SMITH, J. This is an action brought by appellee against appellant in case, charging him with stopping up a ditch and thus throwing water back on his land and destroying his crops. It appears from the evidence that appellee owned forty acres of land lying directly west and adjacent to forty acres owned by appellant on the east. There was some wet land on appellee's lot, and particularly near his west line was a low depression, much like a pond, which held more or less water. It was all open prairie land and there seems to have been very slight fall for this water in any direction, and there was a dispute on the trial as to which way this pond would naturally drain. In 1869 appellant plowed two furrows

upon his land to within ten or fifteen rods of the east line of appellee's land and run thence in a southerly direction to a low depression on his own land. The appellee also made a ditch across a part of his land to meet the ditch, or furrows, made on appellant's land. Afterward appellant closed up the ditch on his line, or at least that is the claim made by appellee, and obstructed the flow of the water, which resulted in throwing it back on plaintiff's premises and injuring his crops. The defendant pleaded the general issue and a trial was had resulting in a verdict for the plaintiff for \$10. The court overruled a motion for a new trial and appellant brings the case here on appeal. The bill of exceptions contains over 300 pages of evidence. Neither the importance of the questions nor the amount involved would seem to justify us in an elaborate review of the questions presented and we shall content ourselves with briefly disposing of them.

We should not disturb the verdict because of any supposed conflict between it and the evidence, but we regret to be compelled to reverse the judgment because of erroneous instructions. Whether there was a natural channel or outlet for water, or even a mere depression of land over appellant's land, was a disputed fact. The first instruction given for plaintiff properly declared that he might drain his lands for agricultural purposes into natural channels or depressions, but did not hypothetically submit in the same instruction that, in order to justify throwing it on appellant's land, there must be a natural channel, depression or outlet over his land through which it might pass. The instruction was bad in that respect and needed that modification, under the authority of *Peck v. Harrington*, 109 Ill. 611, and again reiterated in *Totel v. Bonnefoy*, 123 Ill. 653. And such seems to be required by Sec. 4, Farm Drainage Act of 1887.

We do not think the objections to the second, third, fifth and sixth instructions given for appellee are well taken. But the seventh instruction given for appellee was clearly wrong. It told the jury that if appellant had dug a ditch on his own land and acquiesced in appellee's use of it for "several years" then he would have no right to fill it up, and if he did

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to the damage of appellee, then he would be liable. The effect of this instruction was to tell the jury that appellee might obtain a prescriptive right to flow his water over appellant's land in less than twenty years. This is not the law. *Deyo v. Ferris*, 22 Ill. App. 154, and cases there cited. See also *Totel v. Bonnefoy, supra*.

For these errors the judgment is reversed and cause remanded.

Reversed and remanded.

Z. O. JACKSON, ADMINISTRATOR,

v.

AMELIA S. K. MAY.

Mortgages—Foreclosure—Usury—Application of Payments—Principal and Surety—Priority of Equities in Mortgaged Property—Subrogation.

1. Where one of two loans is usurious, the other is not affected merely because they were made at about the same time and secured by the same mortgage. If the loans are in fact separate and independent, they will be so treated in regard to usury.

2. Where a charge for expense and trouble on the part of the lender in securing money with which to make a loan is included in the note, the transaction is usurious.

3. Where a mortgage, given primarily to secure a note for a new indebtedness, includes personally secured notes for a prior indebtedness to the mortgagee, the proceeds of a sale of the mortgaged premises should be first applied in payment of the note which is otherwise unsecured.

4. The right of personal securities to subrogation depends on whether they have first discharged the principal debt, and whether there are superior equities attaching to the mortgaged property in favor of other parties.

[Opinion filed December 8, 1888.]

APPEAL from and in error to the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding.

Messrs. DUNCAN, O'CONOR & GILBERT, for appellant and plaintiffs in error.

If there is any rule of law well settled it is that the surety upon a promissory note is entitled to the benefit of all other securities for the same debt given by the debtor to the creditor. The surety upon a note secured by a deed of trust by the principal maker has the right to demand that the real estate security shall first be exhausted for its payment before recourse is had upon him. So, too, a creditor who has personal security and also property pledged for the payment of his debt, holds such property in trust for the surety, and must use it in discharge of the debt. *Booth v. Wiley*, 102 Ill. 84; *Kirkpatrick v. Howk*, 80 Ill. 122; *National Exchange Bank v. Silliman*, 65 N. Y. 475.

The mortgage executed by the Jacksons, to foreclose which the bill in this case was filed, was expressly given and taken to secure the payment, first, of these two \$5,000 notes, and second, the note for \$10,867.50. The mortgagee obtained that security in addition to the personal liability of the sureties, and by the law the sureties had the right to demand, either that the mortgaged premises should be sold and the money applied in payment of those two notes before resort could be had upon them, or, at least, that they should be subrogated to the rights of the mortgagee upon the payment by them of these notes.

Another well and thoroughly settled rule is this: that where a mortgage secures several promissory notes falling due at different times, the one first falling due is entitled to priority of payment out of the proceeds of the sale. *Flower v. Ellwood*, 66 Ill. 441; *Herrington v. McCollum*, 73 Ill. 476; 2 *Jones on Mortgages*, § 1699.

Messrs. WALTER REEVES and OSCAR B. RYON, for appellee and defendant in error.

LACEY, P. J. The appellee filed her bill in equity to foreclose her certain mortgage on certain real estate therein named, executed to her by Hiram Jackson and wife, William S. Jack-

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son, Z. Orlando Jackson, and James Jackson and wife, dated November 5, 1883, and acknowledged December 5, 1883, made to secure three certain promissory notes, as follows: Two of said notes for a sum of \$5,000 each, payable one year after date, to the appellee, with eight per cent. interest, dated October 1, 1883, and executed by Hiram Jackson, Z. Orlando Jackson, Wm. Dannel, Samuel J. Hayes, Noble O. Baldwin, and Wm. S. Jackson; and one of the said notes payable to appellee, dated November 25, 1883, for the sum of \$10,867.50 drawing same rate of interest, and signed by Hiram Jackson and Z. Orlando Jackson, due October 1, 1885.

The defense made by all the signers of the first said mentioned notes as well as all the signers of the last mentioned notes, was only partial. It insists that subsequently to the execution of the notes and mortgage it was arranged between the appellee and respondents in the foreclosure proceeding, Hiram and W. S. Jackson and Wm. Dannel, that 240 acres of the land included in the mortgage should be sold to the son of Wm. Dannel, and that the purchase price thereof, which was \$6,681.72, after outstanding incumbrances which were prior to said mortgage had been satisfied, should be applied as payment upon the said two \$5,000 notes upon which the said Dannel was security; that, in pursuance of such agreement, Dannel purchased the land March 1, 1884, at said price, and paid therefor by giving his note and mortgage upon said land, but that appellee wrongfully applied the said amount, \$6,681.72, upon the \$10,867.50, instead of the first two mentioned notes.

The answer also sets up and insists on the defense of usury as against all the said notes, claiming that the loan was one entire transaction, and that the appellee reserved more than eight per cent. per annum interest on the amount, to wit, \$1,720, by that amount being retained by H. N. Ryon, the agent and attorney of appellee, to procure the said loan of \$20,867.50 as a bonus and charge for making the said loan over and above the rate of interest reserved in the notes, which was a device to evade the usury laws, and charges that appellee received a portion thereof and that Ryon advanced a portion of the money, to wit, \$3,500. Hiram and W. S. Jackson were

the principals on the said notes, and the other signers were only sureties. The original respondents, Wm. Dannell and Hiram Jackson, having died, Cephus D. Patterson, administrator of said Dannell, deceased, and Z. O. Jackson, administrator of Hiram Jackson, deceased, were made parties defendant. On March 4, 1887, final decree was rendered in the case, disallowing the claim of the wrongful entry of the credit claimed and disallowing a claim for usury on the two first mentioned \$5,000 notes, and allowing the claim of usury on the other note to the amount of \$517.50. The court found due on the said two \$5,000 notes the sum of \$12,139.94, and on the other note \$3,556.89, after deducting the usury and applying all payments, whether of principal or interest, in the principal, and also allowing \$393.42 as attorney's fee, as provided for by the mortgage.

The decree then ordered the sale of the premises to satisfy the decree rendered for the above amounts and costs of suit, and in case of deficiency in payment of the said note dated November 25, 1883, W. S. Jackson and Z. O. Jackson, and the latter as administrator, etc., to pay the amount of the deficiency of said note to appellee and for execution; and the court rendered a similar decree against the signers of the other notes for any deficiency remaining thereon, but against all the administrators to be paid in due course of administration.

From this decree Z. O. Jackson, administrator of the estate of Hiram Jackson, deceased, prosecutes this appeal, and the other respondents a writ of error, which two suits in this court have been consolidated.

The above appellant and plaintiffs in error assign several causes for error, and among them, and relied on in their brief, are, that the court erred in not making the credit on the two \$5,000 notes, instead of the \$10,867.50 note, and in not ordering the proceeds of the sale of the mortgaged premises to be first applied in the payment of the said two first named notes, and in not allowing the claim of usury as against all the notes, and rejecting all the interest retained in the several notes from their date till the time that they respectively became due, and only computing interest on the balance due, after deducting

all payments, whether for usury or otherwise, out of the principal of the first two notes of \$5,000 each, on the several notes from the times they respectively fall due, and this court is asked to reverse the decree with directions to the court below to render a new decree on the principle above announced.

The only two questions, then, for us to pass upon here, are the questions of usury and the application of the payment of the proceeds of the land sold. Inasmuch as both questions depend to some extent upon the facts in the case as detailed in the evidence, we can more conveniently consider them together, and will do so.

Now, first, as to the manner and circumstances of the negotiations and payment of the money borrowed, as represented in the mortgage. We will not undertake to go over the evidence in detail, but we have examined it with care, and are satisfied that substantially the following state of facts concerning the matter is correct: Hiram and W. S. Jackson were insolvent and had made an assignment for the benefit of their creditors, and were indebted to the amount of about \$60,000, and having an opportunity to settle with their creditors for fifty cents on the dollar, wanted to borrow of the appellee about \$24,000, and made this proposition to H. N. Ryon, an attorney residing in La Salle county, Illinois, to borrow such sum of appellee. Ryon had usually acted for the appellee, who resided in Kalamazoo, Michigan, in regard to her legal business, and sometimes concerning her loans, though as a rule she negotiated them herself.

This was some time prior to October 1, 1883, but at that time he could not give them any definite answer.

In a few days, about the first of October of said year, or two or three days after, appellee came from her home in Michigan to La Salle county, Illinois, and there met one of the Jacksons personally, perhaps the father, as one was the father and the other the son, and refused to make the loan for the amount required, but agreed to loan them \$10,000 on personal security named, the appellees who signed as sureties afterward being the ones agreed on. The notes of \$5,000

now in question were drawn up by Ryon for appellee, and were given over to Jackson to procure the security, who afterward procured the names to be attached.

The note was then placed in the hands of Ryon to hold till the money was sent by appellee. At this time only the rate of eight per cent. interest mentioned in the note was reserved or taken.

Some days afterward one of the Jacksons came to Ryon and made an earnest appeal to him to make an effort to obtain the balance of the desired amount, or at least \$10,000 more, of appellee, she then having returned to Kalamazoo. Ryon told him that he thought it would be hard to do, as he did not think she had the ready money, but could raise it if she wanted to on collaterals which he knew she held, but he would not undertake it as her agent, and would charge them \$1,000 for his services in obtaining the money and in assisting the payment of it over to the creditors of the Jacksons, some of whose claims were in judgment under the compromise. None of the money, it was urged, could go into the hands of the Jacksons. This the Jacksons consented to, and Ryon went on his mission to Kalamazoo to see appellee. On his arrival there he, on account of his former relations with her in a business way, expressly told her that he came as the agent of the Jacksons, and that they were to pay him and that she must not regard him as her agent. She then told him that she would be at great expense raising the money, and she would require a bonus of about five per cent. on this last loan to pay her for this expense. On Ryon's return home he reported this to the Jacksons, and they at once agreed to give it. Appellee then being informed of this, proceeded to raise the money so agreed to be loaned; and Ryon proceeded to get up the mortgage on the real estate and the note last agreed on, which was finally accomplished about the date of the last note. The amount of the note when finally agreed on was for \$10,867.50. The amount that was represented in this note was \$10,350, to be paid over, and which was afterward paid over, to the Jacksons. The sum of \$517.50 was the five per cent. on that sum to be paid to the appellee. In the meantime, before this was

done, the \$10,000 had been paid over to Ryon for the Jacksons on the first loan, but was not yet paid to their creditors. The mortgage was drawn up and Ryon, on his own motion, so wrote it as to cover the first two notes as well as the last note, although that had not been contemplated before that time by any of the parties. The money on the last named note was raised mostly by appellee, but partly by Ryon advancing it and taking appellee's note to himself, which she afterward paid. Afterward, some time in 1884, the Jacksons negotiated and sold the part of the land above named, for which the \$6,681.72 was paid, and the mortgage was released as to it, and this amount applied on the said last named note. There was an attempt made to show that the amount last named was agreed on between Ryon, acting for appellee and W. S. Jackson and Dannell; that this amount was to be credited on the two first named notes on which Dannell was security. This was in consideration that Dannell's son should purchase the land; but this is utterly denied by Ryon, and we think the contention of appellant and plaintiffs in error, all the evidence and circumstances considered, is not sustained in that particular. We have arrived at these conclusions notwithstanding the evidence of W. S. Jackson to the contrary, whose attitude in this case does not highly recommend his case or his testimony to the favorable consideration of this court.

He also seems to be contradicted by his own letter written to appellee, dated October 24, 1883, in which he tells her, "We are depending on that \$10,000 still," and other like expressions. This letter shows beyond question that the loan represented in the first two notes was made independently of that represented in the last note, though they were both closed at or about the same time. We regard the loans as separate and independent and therefore the taint of usury can not inhere to the first two notes. The agreement for the loan in case of the first two notes was not in anywise dependent on the latter. The first loan was without dependence on the second. The security was agreed on and the note drawn up and signed prior to the time the last one was agreed on, and if the last one had failed the first would still have subsisted.

This disposes of the usury charged against the first two named notes. We are satisfied with the finding of the court as to usury charged against the last named note.

Taking the testimony of the appellee herself as being correct we must hold it to have been usurious. The fact that she was to be put to trouble, and perhaps expense, in obtaining the money from her creditors or even in borrowing it, can not be regarded as freeing the transaction of its usurious taint.

It was a contract, a part of which had for its object the loan of money, and without that nothing was to be paid to appellee for her trouble and expenses. If a case like this is not usurious then indeed, it would be easy to evade the statute against taking usury. But we are satisfied that the amount of usury contained in the note as found by the court is also correct. The amount of \$517.50 was no doubt the sum agreed to be received by appellee, and the note made that much too large in consequence. This the court deducted, and it was correct.

The only remaining question is in regard to the proper application of the credit. The question of agreement is settled against appellant and plaintiffs in error. It now remains to be considered whether there is anything in the facts and circumstances that would make it equitable that the securities on the first two notes should be entitled to this credit to the serious impairment of the appellee's mortgage security for her note which is unsecured by personal security.

We think there are no such equitable circumstances. In the first place those who signed the first two notes as surety did so without any expectation or agreement that appellee would take any mortgage security for their benefit. They agreed to stand good for the payment of the two notes in question.

The appellee was making a loan on which she almost wholly depended for her security on the mortgage she was about to take, but in taking it, included the two notes at her own volition, with the other note.

In what manner, may it be asked, are these complaining securities injured by the application of the proceeds of the mortgage security on the debt primarily intended to be secured? They are not injured and may be benefited by the mortgage. If any of the proceeds arising from the sale of the mortgaged

Briggs v. Roth.

premises should remain after satisfying the last note, it would be applied on the note on which they were bound as security and to that extent they would be released. The action of the appellee in including the two first notes in the mortgage could therefore work no disadvantage to them. The rule of law insisted on by counsel for appellant and plaintiffs in error, that the payee is required to hold the mortgage security intact for the payment of the note on which there is personal security, under penalty, in case of failure to do so, of losing the benefit of the personal security, only applies in cases where there are no counter equities in favor of the payee of the note or other persons, superior to those of such personal securities.

As to any right of the subrogation claimed in favor of the personal securities, the rule is that it would depend as to whether or not they had first discharged the principal debt, and whether there were any superior equities in favor of other parties attaching to the mortgaged or pledged property. The question can not be determined by any technical consideration as to which of the two or three named notes in the mortgage first falls due.

The substance and right of the matter must be considered, and its proper solution should be controlled by equitable principles. The credit, then, as we view it, was properly applied on the last note given. As other actions of the court in computing interest and otherwise are admitted to be correct we will not examine the record further. The decree of the court below is therefore affirmed.

Decree affirmed.

CHARLES H. BRIGGS ET AL.

V.

NICK ROTH.

Landlord and Tenant—Trespass—Damages—Contract for Services and Board.

1. A landlord is not justified in driving his tenant out by force, even though the latter has forfeited his tenancy by a breach of the contract under which he holds.

2. In an action of trespass brought by a tenant against his landlord for endeavoring to drive him out by force and for driving away his stock, this court declines to interfere with the verdict for the plaintiff, although neither party is free from fault and the damages allowed might with much propriety have been less.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Iroquois County; the
HON. ALFRED SAMPLE, Judge, presiding.

Mr. STEPHEN R. MOORE, for appellants.

MESSRS. DOYLE & MORRIS, for appellee.

LACEY, P. J. This was an action of trespass by appellee against appellants for attempting to break into his dwelling house, occupied by himself and family, by force, and for driving away two cows and calves from appellee's pasture and depriving him of the use of the pump. The cause was tried before a jury and resulted in the jury finding appellants guilty and assessing damages at \$100, upon which verdict judgment was rendered; from such judgment this appeal is taken.

There is no complaint as to the instructions given by the court; the only ground upon which a reversal is sought is that the verdict is contrary to the weight of the evidence and that the damages are excessive. We have read over the evidence with care, and, while we find that neither party is free from fault, and while the damages might with much propriety have been less, we do not feel justified in interfering with the verdict of the jury. The actual damages done to appellee were slight; yet, the jury had a large discretion in the assessment of exemplary damages, and where there are circumstances of aggravation and malice appearing on the part of appellants, as here, the jury were the judges as to the amount of such damages. According to the appellee's testimony, he had hired to appellants for one year to do farm labor for \$300 per

year, and was to have pasture for two cows, two hogs, a good well and house and three acres for garden; that was all there was of the agreement; he went to work and took possession of the house the first of March; he had no arrangement with appellants to board the men when he hired to them, but made such arrangement the 23d of March: "I agreed," he says, "the men could stay awhile." On the other hand Mr. Briggs, one of the appellants, testifies that the plaintiff hired to work for them for one year for \$25 per month by the year; they to furnish him a garden patch, house, pasture for two cows, a place for two hogs, and appellee was to board appellants' hired help for \$3 per week of twenty-one meals. He lived, slept and ate in the lower rooms in the house, and appellant, Briggs, and his hired man, occupied the two rooms up-stairs. "We had the exclusive use of the up-stairs rooms and our bed and bedding were there, and our clothes." But he does not state that this was a part of the contract. They commenced taking their meals with appellee about the middle of March and continued up to the time of the difficulty.

About the 18th of July appellee refused to board the appellant, Briggs, and his hired hand any longer, under pretense that his wife was sick, although the evidence tends strongly to show that the true reason was he wanted to raise the board to twenty cents per meal. The oats were to be cut and the machine was coming the next day, and appellants did not know where to get board; this certainly was very aggravating to appellants, and was a breach of contract on the part of appellee. Thereupon the appellants canceled their contract with appellee for labor and demanded possession of the house, but appellee refused to give up the house. The appellants got board in a shanty with the "tilers" and continued to occupy the bed-rooms up-stairs till, on the 8th August, appellee locked the outside door and would not allow appellants to enter. This also was done without warning. The appellant, Briggs, then took a rail and went to battering the door down, whereupon appellee shot at him with a pistol and appellant returned the fire, no one, however, being hurt. The appellant then desisted and went away; previous to this,

however, the appellants, after the discharge of the appellee and his refusal to go away, took the pump out of the well so appellee could not get water, drove their wagon over his garden and turned his cows and calves out of the pasture.

We are satisfied that the jury were justified in finding from the evidence that the appellee was to have the entire control of the house as the tenant, and that he was to work for and board the hired men of appellants at \$3 per week, but that they were not entitled to any particular rooms any more than any other boarders. The contract is unlike the one recited in the case of *Cochrane v. Tuttle*, 75 Ill. 361. In that case the landlord was the full proprietor and held possession of the house. Let it be granted that the appellee forfeited his tenancy by refusing to board the appellants' hands, a point, however, we need not decide, yet they would have no right to resort to violent measures in order to regain possession. They should appeal to the law, which the evidence shows that they had not done. They were not justified in attempting to drive the appellee out by force, and, if they resorted to such means, they are liable in an action of trespass. *Reeder et al. v. Purdy and wife*, 41 Ill. 279; *Dearlove v. Herrington*, 70 Ill. 251.

But if the jury believed the testimony of the appellee that the original contract had no reference to the boarding of the hired men, then the refusal to further board would not work any forfeiture of the lease for one year, and the appellants would be without excuse in doing what they did.

Under all the circumstances, though we can not acquit the appellee of all blame, we do not feel at liberty to reverse the judgment on the alleged ground that the verdict is against the weight of the evidence. The judgment is therefore affirmed.

Judgment affirmed.

Anderson v. The People.

SAMUEL ANDERSON ET AL.

v.

THE PEOPLE.

Criminal Law—Appeal—Sec. 21, Chap. 54, R. S.

28	317
71	561

1. No appeal lies in criminal cases, a writ of error being the only mode by which such cases can be brought before this court. This rule applies to prosecutions for misdemeanors.

2. A prosecution under Sec. 21, Chap. 54, R. S., for rescuing cattle after they had been impounded, is a criminal prosecution.

[Opinion filed December 8, 1888.]

APPEAL from the County Court of La Salle County; the Hon. FRANK P. SNYDER, Judge, presiding.

Mr. SAMUEL RICHOLSON, for appellants.

Messrs. MOLONEY & STEAD, for appellee.

LACEY, P. J. This was a prosecution instituted before a justice of the peace under Sec. 21, Chap. 54, R. S., entitled "Fences," for rescuing cattle after they were taken up and impounded. Upon appeal to the Circuit Court and transfer to the County Court by agreement, the case was tried, and resulted in a conviction and fine against the appellant for \$60.

From such judgment this appeal is taken.

A motion by the appellee was made in term time herein to dismiss the appeal, and for cause, claimed that no appeal was allowed by the statute in criminal cases, of which this was one. The motion was held under advisement by this court to the hearing. After careful examination we have become satisfied that the motion must be sustained. This is not a civil but criminal action—a misdemeanor. Under the Constitution the appellant has a right to a writ of error from this court, but not an appeal to it. *Smith v. The People*, 98 Ill. 407. See also *Bowers v. Green*, 1 Scam. 42. Appeals are not allowed by statute in criminal cases. *French v. The People*, 77 Ill. 531.

In the last cited case the court say: "No provision seems to be made for an appeal, and unless there is some statute expressly allowing it, no appeal, it is apprehended, will lie. A writ of error is the only mode by which the case can be brought before this court. * * * Had there been an appearance and joinder in error on behalf of the people, we might, perhaps, treat the case as pending on error; but there has been neither an appearance nor joinder in error, hence the appeal will have to be dismissed."

It is claimed by appellees that in *The People v. St. Louis & Cairo R. R.*, 106 Ill. 412, the Supreme Court has decided that appeals in misdemeanors may be taken to the Appellate Court. We do not regard that decision as so holding. There was no question raised in the case that no appeal would lie, only that the Supreme Court had no jurisdiction; and the court refers to the Appellate Court Act of 1879, Laws 1879, p. 222, for authority as to jurisdiction. The court held that the appeal should be taken to the Appellate Court. In *Ingraham v. The People*, 94 Ill. 428, the court held that the above statute did not authorize an appeal in a criminal case, but only allowed appeals and writs of error to the Supreme Court in those several enumerated cases, according as appeals and writs of error lay in said cases respectively, under the then existing laws, to wit, a writ of error in criminal cases, and in other cases named, both a writ of error and an appeal. Neither the Appellate Court Act of 1879, or as amended in 1887, allows appeals in criminal cases. It must receive the same construction as given by the Supreme Court in the last case cited, allowing appeals and writs of error to that court. The object of the statute was, not to create a new right of appeal or writ of error, but simply to direct to what court appeals and writs of error already allowed might be taken. The appellee insists that this case is not a criminal case, but a *qui tam* action.

We do not so understand it. It is a criminal case below the grade of felony; a misdemeanor. There appear to be only two grades of criminal cases; that of felony and misdemeanor. Therefore the appeal herein is ordered to be dismissed.

Appeal dismissed.

Daly v. Ogden.

ANN DALY AND MICHAEL DALY

V.

E. J. OGDEN AND LORENZ REITZ.

28	319
52	657

Judgments—Bill to Vacate—Fraud—Injunction—Practice—Failure to Assign Errors.

1. The burden of proof rests upon one who seeks to impeach a judgment and enjoin its collection on the ground of fraud.

2. This court declines to interfere with a decree dismissing a bill to vacate a judgment and enjoin its collection, the evidence being sharply conflicting and no errors being assigned on the record.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Will County; the Hon. CHARLES BLANCHARD, Judge, presiding.

Messrs. HALEY & O'DONNELL, for appellants.

Mr. FRED. BENNITT, for appellees.

UPTON, J. This was a bill in chancery filed in the Circuit Court of Will county to vacate a judgment and perpetually enjoin the execution thereof, filed in said court at the September term thereof, 1886, upon which, on appellant's application, a temporary injunction was issued.

The bill recites in substance that on the 5th day of May, A. D. 1886, E. J. Ogden, one of the appellees, through his agent, E. C. Ogden, and his attorney, Fred. Bennitt, caused a judgment to be confessed and entered of record in the Circuit Court of Will county against the appellants for the sum of \$89.95, of which \$25 was for attorney's fees; that said judgment was entered in vacation after the September term of the said court, 1886; that the said appellee, Ogden, caused an execution to be issued upon the judgment and placed the same in the hands of the sheriff of Will county to

execute ; that said sheriff, in pursuance of the command of said writ, to enforce collection thereof, the same not having been paid on demand by appellants, levied said execution on lot five (5), in block numbered seventeen (17), in North Joliet, in the city of Joliet, Will county, Illinois, and was about to advertise and sell said lot to satisfy said execution.

Appellants further charge in their said bill that said judgment was entered without their authority, knowledge or consent ; that the note and warrant of attorney was never executed by them, or either of them, and was a forgery ; that they were in no manner indebted, either jointly or severally, to the appellee, plaintiff in that judgment. The bill prayed for an injunction against the sheriff to prevent a sale of said property and for a cancellation of the judgment, and that such injunction be made, on hearing, perpetual.

To this bill appellees filed their answer by which, in substance, they deny fully and positively that said note and warrant of attorney was a forgery as alleged in the bill, or that the said judgment was had or taken without proper and lawful authority in law and in fact, expressly denying all the material allegations of the bill of complaint. To which answer appellants filed a replication and the cause was heard by the presiding judge of the Will county Circuit Court, sitting in chancery, and upon such hearing said court, by its decree entered of record therein, found the allegations of appellant's bill to be untrue, and found the equities of the case to be with the appellees, dissolved the preliminary injunction, and on suggestion and motion of appellee and proofs heard, assessed the damages for the wrongful issuance of said injunction at the sum of \$9.

From which finding and decree the case is before this court on appeal, upon which a reversal is sought, but no errors are assigned upon the record by appellant, or cross-errors by the appellee. The said appeal might therefore be dismissed under rule 15 of this court.

We have, however, carefully looked into the record of this case and find that the evidence on the hearing was sharply contradictory and wholly irreconcilable, the appellants testify-

Bowes v. City of Galesburg.

ing positively that they never signed the note or warrant of attorney, but admitting that Dr. Ogden, one of the appellees, was employed by them and that they were indebted to him for medical services.

On the part of the appellees, Dr. Ogden testified that appellants did sign the note and power of attorney in his presence for an actual indebtedness due from appellants to his father, and he was corroborated by the testimony of one R. F. Williams, who was sworn and testified on the hearing, as also by the surrounding circumstances in the case.

It is an established rule of law, where a party seeks to impeach a judgment and enjoin its collection on the ground of fraud, the burden of proof rests upon him to establish it. *Stont v. Oliver*, 40 Ill. 245.

The presiding judge who heard the case in the court below and saw the witnesses, could far better judge of their credibility than we can possibly do, and his decision should not be set aside unless it clearly appears that he was in error in the determination of the cause, and no error being specified as having been committed and none being discovered on examination of the record, the decree of the court below is affirmed.

Decree affirmed.

MOLLIE BOWES

V.

CITY OF GALESBURG.

Disorderly Conduct—Ordinance—Conflict of Evidence—Practice—Improper Remarks by Attorneys.

1. In a prosecution under a city ordinance for disorderly conduct, this court declines to interfere with the verdict against the defendant, the evidence being conflicting.

2. An appellate court will not reverse a judgment when the evidence of the successful party considered by itself, without contravening evidence, is clearly sufficient to sustain the verdict.

3. A verdict will not be set aside for improper conduct on the part of the attorney for the successful party in making statements outside of the evidence, where it is plain that no harm has resulted therefrom to the appellant.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Knox County; the Hon. JOHN J. GLENN, Judge, presiding.

Mr. C. D. HENDRYX, for appellant.

Mr. FLETCHER CARNEY, for appellee.

URTON, J. This was a proceeding commenced before a justice of the peace on complaint of Alice Sharp, charging appellant with a violation of Sec. 21, Chap. 37, of the Revised Ordinances of the city of Galesburg, which provides: "That whoever shall assault, strike or beat another, or by mutual agreement fight another, or disturb the public peace by any violent, tumultuous, offensive or disorderly conduct, or shall be guilty of any acts, language, or conduct calculated to provoke a breach of the peace * * * shall be subject to a penalty of not less than three dollars," etc.

The appellant was convicted before the justice, and a fine of \$3 and costs imposed, from which appellant appealed to the Circuit Court of Knox county, where a trial by jury was had, resulting in a verdict and judgment against the appellant of \$50 and costs of suit, from which judgment appellant prosecutes this appeal, alleging that the verdict is clearly against the weight of the evidence; that the city attorney in his argument to the jury on the trial of said cause in the Circuit Court made improper statements not founded upon the evidence in the case, which influenced the jury against the appellant in their verdict, and that the court of its own motion excluded proper evidence from the jury on the trial of said cause.

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It appears undisputed that on the 14th day of May A. D. 1887, the time complained of, the appellant and complaining witness were severally engaged in keeping boarding houses and restaurants adjacent to each other, on South Seminary street, in the city of Galesburg, in Knox county, Illinois.

The testimony on the part of the prosecution tends strongly to show that appellant, on that day and place, was guilty of gross misconduct, which was calculated to, and did, greatly disturb the public peace, by violent, tumultuous, offensive and disorderly conduct and language, and did commit an assault upon the person of one Mrs. Birdson, and the complaining witness.

The testimony on the part of the defense tends to rebut that of the prosecution. We have carefully examined the whole evidence in the case and find that it was sharply conflicting and can not be reconciled.

We do not think it would serve any useful purpose to discuss the evidence in detail. It is not of a character to invite discussion. It was peculiarly a case for a jury, in which to judge of the credibility of the witnesses and to give credit where it should appear to be due.

Upon this branch of the case we content ourselves with saying that in our judgment the jury were warranted by the evidence in returning the verdict, and that appellant was guilty of a breach of the peace; the rule being well settled that appellate courts will not reverse the judgment of the trial court when the evidence of the successful party considered by itself, without contravening evidence, is clearly sufficient to sustain the verdict. *Shevalier et al. v. Seager et al.*, 121 Ill. 564, 569.

It is further urged that improper remarks were made to the jury by the city attorney on the trial in the court below, which influenced the jury in their verdict. The language complained of was "that the appellant and complaining witness had quarreled so much and created so much disturbance, that the city authorities were obliged to interfere to stop it."

We do not desire to be understood as giving countenance in any degree to remarks or arguments of attorneys addressed

to the jury on the trial of a cause, outside the evidence in the case. We regard it as quite reprehensible. Yet, sometimes, despite the utmost care on the part of the trial judge, and perhaps, without thought or wrong intent on the part of attorneys, remarks will be made which are entirely outside the evidence, and directly calculated to be, and are, productive of vicious results and improper verdicts. In all such cases, appellate, and trial courts as well, should be prompt in setting aside verdicts so unduly obtained. But it does not follow that in every case of improper conduct or speech of attorneys to a jury, the verdict should be set aside. It is manifestly only in cases where harm results therefrom to the party complaining that the courts will interfere, and this must be determined by the facts and circumstances of each particular case. A less elastic rule would be productive of greater injury than benefit to parties litigant.

We have already said the jury were warranted from the facts in the record in finding the verdict rendered, and we fail to see from the facts and circumstances in the case, how the statement of appellee's attorney in the court below could have been productive of the verdict, in whole or in part. The reflection upon the previous conduct of the appellant, in the remark complained of, bore as heavily on the complaining witness as upon appellant, and in no way pointed out the aggressor, or which was most at fault. On the contrary, the tendency, if any, would be to lessen, rather than increase the verdict palliating appellant's wrongful conduct by the fault of the complaining witness—decreasing deserved punishment for the wrongful act by the provocation asserted.

No objection is made to the instructions of the court, and while the point is made that the court below of its own motion excluded proper evidence from the jury, no evidence is pointed out or shown as having been excluded, and we fail to find any such exclusion of evidence in the record.

We fail to find any error in the verdict of the jury, or the rulings or judgment of the court below, to authorize us to disturb either, and the judgment of the court below must be affirmed.

Judgment affirmed.

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THE FIRST NATIONAL BANK OF MONMOUTH

V.

MARTHA STRANG, ADMINISTRATRIX.

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188 347

National Banks—Reorganization—Special Deposits—Loss—Trotter—Liability of New Bank—Measure of Damages—Evidence—Demand.

1. A national bank may receive special deposits and give receipts therefor.

2. In an action to recover from a national bank the value of certain government bonds which had been specially deposited with a national bank which, having gone into liquidation, was succeeded by the defendant bank which had the same name, place of business, books, business, and substantially the same officers, the interest on said bonds having been regularly paid after the reorganization by the defendant until its own suspension, when the bonds were found to be missing, it is *held*: That, from the time of the organization of the new bank, the acts and declarations of the cashier within the scope of his authority were the acts and declarations of said bank; that his knowledge in regard to the bonds in question was the knowledge of both banks; that the payment of the installments of interest by the new bank was an admission that the bonds were in its possession; that the court below was warranted in finding that said bonds came into possession of the defendant bank upon its organization; and that the demand made, if any was necessary, was sufficient.

3. The measure of damages in an action of trover is the current market value of the property at the time of its conversion with interest until the time of trial; no distinction or exception to this rule is recognized when the property converted happens to be bonds, and when the demand and refusal either constitute the conversion or afford presumptive evidence of it.

[Opinion filed December 8, 1888.]

IN ERROR to the County Court of Warren County; the Hon. T. M. SHAW, Judge, presiding.

Messrs. KIRKPATRICK & ALEXANDER and GRIER & STEWART, for plaintiff in error.

Neither the declarations of Hubbard, nor the receipt given by him in 1879, nor any of his acts during the existence of the old bank, or while he was an officer of the old bank, and before he was an officer of the defendant bank, could in any way be evidence against the new bank to bind it, or even to show the

existence of the bonds. The whole weight of the receipt, or of the declarations of Hubbard, are as admissions, and can not tend in any way to bind the defendant bank, because at the time they were made he was not an officer of the defendant, nor was it even in existence.

There being no legal connection between these two corporate beings, the iniquities of the former can not be visited upon the latter; and although there might be evidence enough in the record to show the former a bailee of the bonds sufficient to make it responsible for them, that could not affect the latter. If these people had such a claim against the former, they had the right and should have sought to make it out of its estate, and not out of the defendant, simply because it was a namesake, or because it bought a part of the assets of the former.

In order to show liability on the defendant as a bailee of the bonds, they must show the bonds, at some time, in the possession or custody of the defendant. In order to show a liability in trover, they must show the bonds came into the possession of the defendant, and a conversion of them, or what would be equivalent to a conversion. This they wholly fail to do by any evidence legal to bind the defendant. The possession of the bonds by the old bank, if it ever had such possession, would not be possession by the new bank, for the reason that they were entirely distinct corporations.

The new and the old corporations are not the same. See *Bellows v. Hallowell, etc.*, Bank, 2 Mason, 44; *Blair v. The St. L., H. & K. Ry. Co.*, 22 Fed. Rep. 36; *Wyman v. Hallowell, etc.*, Bank, 14 Mass. 57; *Bruffet et al. v. Great Western Ry. Co.*, 25 Ill. 310; *Cook v. The Detroit, Grand Haven & Milwaukee Ry. Co.*, 43 Mich. 349; *L. E. & W. Ry. Co. v. Griffin*, 92 Ind. 487; *Neff v. Wolf River Boom Co.*, 50 Wis. 585; *Menosha v. Milwaukee Railroad Company*, 52 Wis. 414.

These two associations being entirely separate and distinct, the defendant association is not liable for the debts or default of the other, except as included in the special contract between them.

In order to recover in trover, it was necessary that plaintiff should show the possession of the bonds in question in the

defendant; showing possession in the old bank was not sufficient. It will be kept in mind that no one knows that the bonds sued for were ever in existence; no one knows that Hubbard ever made the exchange; no one ever saw the bonds, nor even coupons from the bonds. All the evidence there is to prove that the exchange of bonds was made, is Hubbard's declarations while cashier of the old bank. All the evidence that the bonds sued for were ever in the old bank, is the receipt given by Hubbard, while acting as its cashier, and the presumption which might arise from the payment of what purported to be interest on such bonds, quarterly.

It is a proposition so axiomatic as not to require the citation of authorities that, in order to bind a person by the acts or declarations of an agent, the person doing the acts, or making the declarations, must be either in fact the agent, or held out as an agent by the person sought to be held. But in this case the defendant association sought to be held by this receipt and these declarations, was not even in existence at the time the receipt was given, or the declaration made. There being no direct proof that the bonds were in fact exchanged, and that the bonds sued for were actually in the possession of the old bank, the only way in which the existence of the bonds or their custody by the old bank is proven, is by the admissions of Hubbard, and by the admission of that fact contained in the receipt of the old bank. These being simply admissions of the old bank, or its agents, and that is all any of them are, they are not evidence against the defendant.

It will be observed that, at no time after the organization of the defendant association, was any receipt given for the bonds, nor were they ever seen by any one, nor are there any declarations by Hubbard, or any one else connected with the defendant, showing that any such bonds were in its custody, or even in existence. The only evidence in this record which could possibly be construed to that effect, is the fact that Hubbard from time to time paid to the agent of the plaintiff, what she took or understood to be, quarterly interest on her bonds. Had the bonds been traced to the possession of the defendant, or it connected with them in such a manner as to

impose on it an obligation to become accountable for them, or look after them, then there might be some weight given to such payments, as an admission tending to bind it; but the bonds never having been traced to its possession or custody, and there being no evidence of any obligation ever having been assumed by the defendant in reference to them, that fact is not evidence to bind it. The most that can be said for the evidence is, that in a suit against Hubbard, it might be taken as an admission by him, but not so as against the bank. The bonds never having been shown to have been in the custody of the defendant, and there being no proof of any obligation ever having been undertaken by this bank in reference to them, Hubbard could make no declarations in that manner, which would bind the defendant. It was under no obligation to pay or collect the interest on the bonds, and when Mr. Hubbard undertook to do anything of that kind, or pay interest on the bonds, he was wholly outside of his duties and outside of the scope of his authority. *Henry v. Northern Bank*, 63 Ala. 527; *Bank of United States v. Dunn*, 6 Pet. 51; *Bank of the Metropolis v. Jones*, 8 Pet. 12; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Wyman v. Hallowell and Augusta Bank*, 14 Mass. 58; *Grimshaw v. Paul*, 76 Ill. 164; *First National Bank of Lyons v. Ocean National Bank*, 60 N. Y. 278; *West St. Louis Savings Bank v. Parmalee et al.*, 95 U. S. 557; *Morse on Banks and Banking*, pp. 188, 543.

In trover the plaintiff must prove a conversion of the property by the defendant. 1 Chitty's Plead., title Trover, 156; 2 Greenl. Ev., Sec. 642.

A demand and refusal does not of necessity prove a conversion unless it is shown the party has it in his power to deliver up the goods, and with good cause refuses to do so. 1 Chitty's Plead., title Trover, 160; 2 Greenl. Ev., Sec. 644; *Race v. Chandler*, 15 Ill. App. 532; *Keime v. Dale*, 14 Ill. App. 308; *Sturges et al. v. Keith*, 57 Ill. 451; *Wiley v. The First National Bank of Brattleboro*, 47 Vt. 546.

If these bonds ever came to the custody of the defendant it can not be said they were lost through its negligence. It took the same care of deposits left for safe keeping which it

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did of its own valuable property, and such as it was proper to take with such property. Its servants, until the time of the failure, were supposed to be honest by every one, and its cashier bore a good reputation for honesty and ability, and the bank would not be liable for his thefts. Morse on Banks and Banking, p. 97; Foster v. The Essex Bank, 17 Mass. 479; Scott v. National Bank of Chester Valley, 72 Pa. St. 461.

Messrs. MATTHEWS & PEACOCK and JAMES A. MCKENZIE, for defendant in error.

The receipt itself is *prima facie* evidence that the bonds were deposited, and there is not in the record a syllable of evidence to contradict it. The admission of Miss Martha Strang that she never saw the bonds, is in no sense evidence to contradict the receipt.

The question of power of a national bank to receive special deposits and give receipts for them, is settled. Revised Stat. U. S., Sec. 5228; Chattahooche Nat. Bank v. Schley, 58 Georgia, 369; First Nat. Bank v. Graham, 100 U. S. 699; First Nat. Bk. of Monmouth v. Dunbar, 118 Ill. 625, which last case has much in common with this case.

The acts and declarations of its cashier were the acts and declarations of the bank No. 85, and the acts and declarations of its cashier were the acts and declarations of bank No. 2751, the party to the record here.

Not only the admissions and declarations of parties to the records are admissible, but also the acts and declarations of those who are in privity with them. Greenleaf on Ev., Vol. 1, Secs. 189, 190.

We are entitled to it upon the ground of privity. Smith's Leading Cases, Vol. 2, p. 390; 2 Wharton on Evidence, Sec. 1163; Vennum v. Thompson, 38 Ill. 144; Mueller v. Rebhan, 94 Ill. 149; Hanchett v. Kimbark, 118 Ill. 129.

We urge that the court below had reason to be satisfied that the preponderance of evidence was with the plaintiff below; that the bonds came to the defendant bank as a special deposit from bank No. 85.

The demand and refusal are not claimed by us to be conclusive evidence of a conversion, but they are *prima facie*

evidence. 1 Chitty, p. 157; 2 Greenleaf, Sec. 644; Johnson v. Howe, 2 Gilm. 342; Bruner v. Dyball, 42 Ill. 34.

Demand and refusal are both proved and admitted. Then they must account for the bonds. They have utterly failed to do so. No reasonable mind, from this evidence, can decide what finally became of the bonds. If we take the view that Hubbard sold them for the benefit of the bank, no demand and refusal are necessary. See Bank v. Dunbar, 118 Ill. 625.

UPTON, J. This was a suit begun by Janet Strang in her lifetime to recover the value of thirty-one (31) \$100 four per cent. United States Government bonds, claimed to have been deposited for safe keeping with the plaintiff in error by the intestate of the defendant in error.

Some time in December, 1873, the defendant's intestate deposited for safe keeping in the First National Bank of Monmouth, Illinois, \$3,100, in 6-40s and 7-20s United States Government bonds, taking its receipt therefor.

The interest, as the same from time to time became due upon these bonds, was paid at said bank. In 1879, this class of bonds, 6-40s and 7-20s, having been "called" in by the Government under the act of Congress authorizing the issue thereof, the defendant administratrix, as agent for her mother, Janet Strang, applied at the bank and made inquiry as to the method and means of making an exchange of these "called" bonds for other government bonds of a like amount. B. T. O. Hubbard, the cashier of the bank, informed her that the bank was doing business in Washington and could make the exchange for her without further trouble to her, and thereupon direction was given for the bank to make the exchange.

Shortly thereafter, in July, 1879, the defendant in error, calling at the bank to hear if the exchange had been made, was informed by the cashier, Hubbard, that the exchange had been made, and he then wrote and delivered to her the following receipt, viz.:

"\$3,100.

MONMOUTH, ILL., July 24, 1879.

"Received of Mrs. Janet Strang for safe keeping in our bank safe, thirty-one hundred dollars United States four per

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cent. bonds, interest payable July 1st, October 1st, January 1st and April 1st.

“B. F. O. HUBBARD,
“Cashier.”

Upon the delivery of this receipt she paid to said Hubbard for the bank, for difference in making the exchange, or fees for purchase, the sum of \$8, and she delivered to said cashier the receipt of the bank for the deposit of the other bonds made in 1873. The bonds for which the last receipt was given were not shown to the defendant in error at any time after the exchange, but the interest thereon was paid at the bank quarterly when called for at its counter during its business hours, and from the general funds or money of the bank, as it had been before, from the time of the taking of said receipt, in 1879, until the bank closed its doors, in 1884, being \$31 every three months, the last of which payments was made on April 1, 1884, one week before the bank closed and ceased doing business as hereafter stated.

B. T. O. Hubbard was the cashier of the bank from some time in 1868 until the bank ceased to do business, in 1884. It was the custom of the bank to receive special deposits for safe keeping, and a part of its vault had pigeon holes or boxes for that purpose.

The First National Bank of Monmouth, Illinois, was chartered September 17, 1863, and the treasury number of its charter was 85, and it went into liquidation in the spring or early summer of 1882, its charter expiring in the summer or fall of that year.

The stockholders of this association, or a part of them, desiring to continue the banking business under the national banking law, organized an association having the same name as the old one, viz., “The First National Bank of Monmouth, Ill.,” which new association was duly chartered under the act of July 7, 1882, with the United States Treasury number, 2757. This new association began business on or near the date of its charter in the banking room formerly occupied by the old banking association. The officers and directors of the old association, with one exception, became the officers and directors of the new association.

By a written agreement of July 7, 1882, between the First National Bank of Monmouth (in liquidation) and the new association, the new association took the assets of the old (except its surplus of \$50,000, which was divided among its stockholders), and assumed to pay all its liabilities "to the extent and as shown by its books." B. T. O. Hubbard was appointed cashier of the new bank and continued to act in that capacity until April 8, 1884, when it was put in liquidation and a receiver was appointed for it by the comptroller of the Treasury of the United States under the National Banking Act.

W. C. Oakley, a national bank examiner, took possession of the said last named bank on the 8th day of April, 1884, and then made an examination of its affairs and scheduled its assets; he found \$400 in United States bonds in the bank safe, \$50 in 4 per cent. bonds, and \$350 in 4½ per cent. bonds.

On the 29th day of April, 1884, Guy Stapp was commissioned receiver of the bank, and took possession thereof on the 2d of May, 1884. No package or special deposit was found in the bank or its vault or safe, marked or indicated as belonging to Mrs. Janet Strang, or any government bonds other than those before indicated in the safe with the assets of the bank.

Other special deposits were found in the vault of the bank belonging to various persons, the ownership of which was marked or indicated thereon, and which were, from time to time, delivered by the officers of the bank as called for, receipts being taken therefor by such bank officers.

The special deposits were not scheduled or taken possession of, or in any manner interfered with by the receiver. No entry or memorandum of any special deposits was shown upon the books or papers of the bank.

The books of the bank showed that at the close of its business, April 8, 1884, it should have had \$131,000 cash in bank; there was turned over to the receiver between \$7,000 and \$8,000 only.

The books of the bank did not show any United States bonds. Demand was made of Joseph Martin, president of the bank, in writing (to which was attached a copy of the receipt),

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for the bonds in question, on the 18th day of April, 1884. The bonds were not delivered on such demand. This suit was commenced April 22, 1884. On the 26th January, 1886, Janet Strang departed this life and her death was suggested on the record. Martha Strang was appointed administratrix of her estate, and, on motion, was substituted as plaintiff in this suit.

The first and second counts in the declaration were in case for the loss of the bonds through negligence, and the third was in trover for the wrongful conversion of the bonds. Plea, the general issue.

The case was tried by the court without a jury, by consent, and the issues were found for the defendant on the first and second counts, but found for the plaintiff on the third count, and judgment was entered against the defendant for the sum of \$4,527.93 damages, and for costs; to reverse which judgment the case is brought to this court, and it is assigned for error, 1st, that the court below admitted improper evidence offered by the plaintiff; 2d, that the court erred in refusing proper evidence offered on the part of defendant; 3d, the court erred in finding for the plaintiff; 4th, the court erred in the amount of its findings; 5th, the court erred in refusing motion for new trial.

First. It is claimed the receipt read in evidence, of date of July 24, 1879, issued by the First National Bank of Monmouth, "Number 85," was improper evidence against this defendant, the First National Bank of Monmouth, "Number 2751."

The same objection is made to the evidence of Martha Strang as to the deposit in the old bank, "No. 85," of the \$3,100 par value of 6-40 and 7-20 government bonds, and the exchange thereof for the like amount of four per cent. government bonds of the par value of \$3,100 by Hubbard, cashier of the old bank, and of the payment of the installments of interest thereon.

It is true that the basis of the claim of plaintiff's intestate is the receipt and deposit of the bonds in question with the First National Bank of Monmouth number 2751, and its subsequent conversion of them to its own use. It must be borne in mind that while in fact the old bank went into

liquidation and ceased business on a particular day, the new one was formed under the same name, at the same time, doing business at the same banking house, having the same president, the same cashier, the same employes, the same vault and safe, and was the same to all outward appearances, with the same special deposits that the old bank, number 85, had the day before. This record fails to show that plaintiff's intestate, or indeed, the business public, was aware of any change in the legal status of bank "number 85." So far as outward indications went, it was the same after bank "number 2751" was announced as before. One evening the curtains went down on bank "number 85" and the next morning went up on bank "number 2751." It became a different bank in law and in fact by the private action of its stockholders taking a new number at the Treasury Department of the Government, and after dividing \$50,000 of its surplus assets among the stockholders of the bank "number 85," it transferred its assets remaining, banking house and fixtures, and contracted for the discharge of its liabilities "as shown by its books;" its special deposits passed to the new bank, and the old bank ceased to exist. But any one doing business with the new bank or its officers as a special or ordinary depositor with the bank, who was not informed of the change, would not have discovered it.

We think the question of the power of a national bank to receive special deposits and give receipts for such, is settled. Revised Statutes U. S., Sec. 5228; *Chattahooche Nat. Bank v. Schley*, 58 Ga. 369; *First National Bank v. Graham*, 100 U. S. 699; *First National Bank of Monmouth v. Dunbar*, 118 Ill. 625.

Win. P. Schall testified: "My connection with this bank began in March, 1881; I was individual book-keeper. It was the custom of the bank to receive special deposits for safe keeping. Papers of different kinds were kept there; they were usually in envelopes. There were several tin boxes that set on the floor in the vault; some of the directors had special deposits there. I suppose the directors knew outsiders had special deposits there; quite a number of special deposits

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were there all the time I was there. I was in the employ of the bank at the time of its re-organization. David Rankin was president of the bank on July 6, 1882. B. T. O. Hubbard was cashier. Willis S. Hubbard and myself were book-keepers. There was no notice given depositors to call and get deposits, general or special, that I know of, when the bank changed. The old bank shut down the windows at night and the new one opened them in the morning. The new bank had the same books, the same accounts, the same employes, and the same things in the vault. I am acquainted with Martha Strang; have seen her in the bank frequently. Papers left for safe keeping were kept in the vault; it was a room eight by ten feet, supposed to be burglar and fire proof. It had three doors; a wicket door with spring lock, and double doors with combination lock. The cashier and teller had the combination and no one else, I think, to the vault door. The depositors did not get into the vault; deposits were handed to some officer of the bank, and when called for, were handed out by some of its officers."

Robert J. Gun testified: "Am one of the attorneys for defendants in this case; was employed in the bank about noon on the day of its failure; quite a large number of special deposits were there; when bank closed I had to do with delivery of special deposits; by direction of Oakley, the matter was left largely to me. There were two packages of special deposits in the safe in the vault. Safe was inside vault; had to send to Chicago for expert to come and open it. In safe were some United States Government bonds, 4 per cent. and $4\frac{1}{2}$ per cent. bonds. Did not count those bonds myself."

Martha Strang testifies: "The receipt for these bonds was given to me by B. T. O. Hubbard; he was cashier of the First National Bank at Monmouth. I received payments of interest on the bonds mentioned in this receipt to my mother as it became due; on the day the interest came due from the bank, Hubbard, the cashier of the bank, paid it to me from October 1, 1879; the last payment April 1, 1884, just one week before the bank closed. It was paid four times a year right along from 1879 to 1884. The money paid me was taken from the safe generally, but sometimes from money lying on the table."

By the seventh division of Section 5136, Revised Statutes of the United States, the First National Bank of Monmouth, Illinois, was authorized, by its officers and agents or board of directors, to exercise all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, bills of exchange and other evidences of debt; by receiving deposits; and by the fifth division of the same section, it was authorized to elect or appoint a board of directors, president, vice-president and cashier, and to require bonds of them.

The plaintiff's intestate, in the month of December, 1873, did make a special deposit in the First National Bank of Monmouth, Illinois, of United States Government bonds of the par value of \$3,100; these bonds were designated as Government six-fortys and seven-twentys, and a receipt by the bank was executed therefor and delivered to her. These bonds, being called in by the United States Treasurer under the act of Congress authorizing the issue thereof, at the request of plaintiff's intestate were, by the bank, through its cashier, sold or exchanged for the like amount in par value of what was called United States Government four per cent. bonds, and the difference in the sale and re-purchase or exchange, or the fees for such exchange or purchase, was paid to said bank, being \$8, by plaintiff's intestate.

These bonds last named were left in said bank as a special deposit soon after the purchase or exchange thereof, and a receipt therefor given, dated July 24, 1879, as is rendered by its cashier, in the receipt given therefor. By the terms of this receipt these bonds were to be kept in the safe of the said bank, to which its cashier and agent alone had access.

In 1882, when the old bank went out of existence, sold out its effects to the new bank, number 2751, it left the special deposits intrusted to it with the new bank; at least there is some evidence to that effect, as we have shown in the record, and no evidence to rebut it. From the time of the organization of the new bank, number 2751, in July, 1882, when Hubbard was appointed its cashier, the acts of the cashier, within the scope of his authority, were the acts of the bank.

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It will not be denied that it was within the scope of his authority to purchase, or deal in bonds and coupons as well as other commercial securities. It is undisputed that, from the date of the re-organization down to within some days of the close of the defendant bank, the old receipt was allowed to stand as originally issued, therein admitting the possession of these bonds for safe keeping, without notice that the new bank had undertaken to pay debts and liabilities of the old bank only "to the extent and as showed by its books," and had by its cashier actually paid on the bonds called for by this receipt the coupons or quarterly installments of interest until within one week of the failure of the bank, being seven quarterly installments of interest.

There is no evidence tending to show that, at the time the old bank went out of existence, in 1882, these bonds were not in its safe, and if they were there when the new bank commenced business, and the cashier of the old bank as well as of the new bank knew it, his knowledge was the knowledge of the old as well as of the new bank. *Bank v. Dunbar*, 118 Ill. 625.

The acts of the cashier of the new bank, after its re-organization, in the payment of the installments of interest with the funds of the bank, was an admission that these bonds were in its possession, and the purchase or payment of the coupons are circumstances to prove, if not actual proof, that the bonds were in the safe or vault of the new bank, and subject to its control, after its re-organization.

In this view, evidence connecting the old bank, number 85, with the new bank, number 2751, was proper. The acts and declarations of its cashier, within the scope of his authority, were the acts and declarations of bank number 85, by the giving of the receipt in question for these bonds, and the like acts and declarations of its cashier recognizing the bonds in possession of the new bank by the payment of interest thereon, were the acts and declarations of bank number 2751, the party to the record here.

We think the court below did not err in admitting or excluding evidence offered on the part of the plaintiff upon the matter complained of.

Second. As to the second assigned error, it is sufficient for us to say that no evidence is pointed out as offered by the defendant which was refused admission or consideration by the court below.

Third. We think, from all the evidence in this record and the surrounding circumstances in evidence, the court below was warranted in finding that the new bank, the plaintiff in error, had in its possession at the time of its organization the bonds in controversy in this suit, which facts and circumstances we have sufficiently commented upon in the examination of the other errors assigned and considered. At least, we think, the plaintiff made, by the evidence, a *prima facie* case, and the court did not err in so finding.

Fourth. It is claimed that the court below erred in finding for the plaintiff the amount of the judgment below. This error assigned, questions the rule of damages adopted by the court below. It is insisted that the measure of damage was the value of these bonds when taken, and not when a demand was made.

We understand the proper measure of damages in an action of trover is the current market value of the property at the time of its conversion, with interest from that time until the trial; and in this State no distinction or exception is recognized when the property converted happens to be stocks; and where the demand and refusal either constitute the conversion or afford presumptive evidence of it, it is no infringement of this rule to regard that—the demand and refusal—as the time for estimating the value. *Sturges v. Keith*, 57 Ill. 451.

The rule as claimed by plaintiff in error is wholly impracticable in this case, since it can not be determined when these bonds were actually taken. The court found, and we think it was authorized to find under the evidence, *prima facie*, that the bonds in question came into possession of the plaintiff in error upon its re-organization, with the other special deposits of the old bank, and that it has paid the seven coupons or installments of interest as the same became due thereon up to the time of its failure, or within six days of that time; and its failure to show any legal excuse for the absence of the

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bonds, either by direct or circumstantial evidence in the case, upon demand made on the officers of the bank therefor, and its refusal or neglect to deliver the same, afford presumptive evidence of the conversion of these bonds; and, for the purpose of estimating the damages in this case, the court below was authorized to assess the damages at the current market value of the bonds at the time of such demand and refusal, which, as shown by the evidence, was \$1.23 on the dollar on the 18th day of April, 1884; and the damages assessed in the court below were much below that rate which, under the evidence and the rule as stated, the court would have been authorized to find.

It is insisted also that the demand in the case at bar is wholly inoperative and of no avail, because made after the bank examiner had taken possession of the assets of the bank and it was beyond the power of the bank to comply with such demand. The evidence is that the special deposits were not taken possession of by the bank examiner or receiver, but were left in charge of the officers of the bank, who delivered the same as called for to the owners thereof. Besides, if these bonds should be regarded as a special deposit, notwithstanding the appropriation by the bank, and it had failed, and its property was in the hands of the United States authorities, the officers of the bank still had the right, under the National Banking Act, to deliver special deposits. Revised Statutes of United States, Sec. 5228; *Bank v. Dunbar*, 19 Ill. App. 558. If there was a conversion in fact before failure, then no demand would be necessary. After a careful examination of this record we find no error that ought, in our opinion, to reverse the judgment of the court below in this case, and we think it should be affirmed, and it is so ordered.

Judgment affirmed.

HERMAN H. CARTER

V.

JOEL CARTER.

Contracts—Costs of Test Case—Contribution—Limitations—Continuing Agreement—Question for Jury—Partnership.

1. The joinder of two or more persons in a single adventure for their mutual advantage does not constitute them copartners in such sense as to oust a court of law of jurisdiction in respect thereto.

2. Where two persons, as between themselves by parol agreement, are each liable for one half the costs of an extended litigation, the one who is primarily liable as a party may await the enforced payment of the entire costs at the end of such litigation, and then compel the other to contribute his proportion, although more than five years have elapsed since certain of the items became due and payable, the contract being a continuing one.

3. In the case presented, the question whether there was a verbal contract for the payment of the expenses of the suit in question, was for the jury, the evidence being conflicting.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding.

Messrs. CHARLES FOWLER and J. H. FOWLER, for appellant.

The only conclusion that can be derived from appellee's testimony is that he was to prosecute his suit, pay the costs when incurred, and to be reimbursed for one-half of them by appellant. Some of the costs and expenses were due when incurred and the balance when the case was determined, which resulted in a judgment against plaintiff, appellee, for costs. He so considered it, for in October, 1878, he presented a bill for one-half of the expenses, paid in first trial, to appellant, which appellant refused to pay. Appellant himself testifies that that was his understanding of the contract. If that is true, we contend that one-half of the costs in the second trial were due the appellee when the cause was remanded back, June 17, 1880. *The President, etc., v. Joel Carter*, 6 Ill. App. 421.

A right of action accrued at that time under the contract alleged by the appellee, and therefore the statute of limitations began to run from that time instead of the time when appellee paid them on a judgment against him and his sureties on his bond for costs.

The court modified our third instruction by instructing the jury that the statute began to run when plaintiff, appellee, paid them. This, we contend, is not the law and never was. We understand the rule announced in all the text books and decisions of the courts is, "that the statute begins to run from the time that a right of action accrues to the plaintiff when he could bring suit." *Starr & C. Ill. Stat., Statute Limitations, Sec. 15, Chap. 83; Shelburne v. Robinson, 3 Gilm. 600; Cagwin v. Ball & Co., 2 Ill. App. 70; 3 Parsons on Contracts, 6th Ed., 1; Wood on Limitations of Actions, Secs. 117, 119, 120, 141, 147; Brant v. Gallup et al., 111 Ill. 487; McKerras v. Gardner, 3 Johns. 137; Williams v. Hurst, 25 Texas, 667; Hitt v. Sharer, 34 Ill. 9; Thompson v. Reed, 48 Ill. 119.*

As to construction of words, "when a cause of action accrues," see *Humphry v. Cole, 14 Ill. App. 176; Cochrane v. Oliver, 7 Ill. App. 176; Collins v. Thayer, 74 Ill. 138.*

Where parties agree to share in the profits of a business the law will infer a partnership between them in the business to which the agreement relates. This presumption will control until rebutted by proof to the contrary. *Lockwood v. Doane et al., 107 Ill. 236.*

By the contract there was clearly that joint interest in the particular adventure which would constitute the parties partners. *Robbins v. Laswell, 27 Ill. 365; Burgess v. Badger, 12 West. Rep. 806; S. C., 14 N. E. Rep. 857.*

MR. GEORGE H. HAIGHT, for appellee.

UPTON, J. This is an action of assumpsit commenced in the La Salle Circuit Court by the appellee against the appellant, on the 19th day of February, 1887, for the breach of an alleged verbal contract to pay one-half of the expense of a suit brought by the appellee, Joel Carter, against the village of

Earlville, in said county, for damages sustained by the falling of a bridge in that village, while Joel and his brother, Herman H. Carter, were passing over it upon the street of that village.

The record in this case shows that some time in the spring of the year 1876 the appellant and appellee, while passing over a bridge in the streets of said village, were injured by the fall of a bridge; that during that year, some time in October, suits were commenced by appellant and appellee individually in the Circuit Court of La Salle county against the village, to recover damages for injuries claimed to have been by them severally sustained by the fall of the bridge.

The appellee settled his suit with the village before any trial was had. In February, 1878, appellant tried his suit in the Circuit Court and obtained judgment, which was appealed by the defendant village to the Appellate Court. The Appellate Court reversed the judgment and remanded the cause.

In February, 1879, a second trial was had in the Circuit Court, and again resulted in a verdict against the village, from which an appeal was again taken to the Appellate Court, which court again reversed the judgment and remanded the cause. The case was not again tried. In the prosecution of this suit Joel Carter, appellee, was, previous to the second trial, directed by the Circuit Court to give bond for costs, which he did, signed by himself as principal, and one William Wilson and the appellant, Herman H. Carter, as sureties.

After the cause was remanded the second time, suit was brought on the bond for costs, filed by the appellee in the Circuit Court, and judgment was obtained thereon against appellee and his sureties, amounting to about the sum of \$256.98; other sums were paid by the appellee in the progress of said suit between February, 1878, and August, 1886, amounting to about \$268.45, as costs and expenses therein, exclusive of attorney's fees. This, in substance, is not disputed.

It is claimed by appellee that appellant became liable to pay the one-half of the costs and expenses of the prosecution of the suit of appellee against the village of Earlville as a

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test case, to determine the right to recover, not only in that suit, but in the one pending in favor of appellant against the village, defendant, on the same state of facts, by virtue of a verbal contract and agreement to that effect made, as is alleged, near the time of the commencement of the two suits against the village of Earlville, and before the settlement of appellant's suit with said village. This is denied by appellant. And the contention in the court below was whether any such verbal contract of a legal character was made between the parties, and, if so, whether the statute of limitations applied to the whole or any part thereof. The case was heard by a jury in the court below, who found a verdict for the appellee and assessed his damages at \$128.49, from which an appeal was taken to this court.

It is manifest that whether or not a verbal contract for the payment of the expenses of the suit of appellee against the village of Earlville was made as claimed, was a question of fact for the jury. The evidence was conflicting in regard thereto, and we can not say that it is insufficient to support the verdict.

It is further insisted that this suit can not be maintained, for the reason that the verbal agreement, if established, created a partnership between appellant and appellee, and as no accounting or settlement had ever been made, and no balance struck between the partners, a court of law had no jurisdiction. Whether a partnership in the prosecution of suits of this character can legally be made or enforced we are not called upon now to determine. The question presented to us is whether, from the evidence in this record, they were partners in the particular transaction out of which the present claim arose. The record in this case at most discloses that appellant and appellee joined in the single adventure of the prosecution of a suit to determine the liability of a municipality to respond in damages for an alleged personal injury they had received in the fall of a bridge, over which they were together passing in the limits of the municipality, and which it was claimed it was bound to keep in safe condition and repair.

In *Hurley v. Walton*, 63 Ill. 260, it was held that the joining of two or more persons in a single adventure, in which the profits are to be equally divided, does not constitute such persons co-partners in such sense as to oust a court of law of its jurisdiction in respect thereto. We regard this as decisive of the question.

By stipulation filed in the court below the statute of limitations is interposed, and it is insisted by appellant the statute is a full defense to all of appellee's demands, because the record shows, as is claimed, that items of claim, except the receipts for money paid by appellee in August, 1886, to the clerk of the Circuit Court of La Salle county, being the sum of \$256.98, was paid in the years 1878 or 1879, and that as to the sum of \$256.98, which was a judgment on a bond for costs, as before stated, the several items comprising that judgment were due and payable more than five years prior to the commencement of this suit, and that an action then accrued and the statute commenced to run from that time. Under the facts in this record we can not yield or assent to that proposition. It will be observed that, under the verbal contract as found by the jury in this case, it was as much the duty of the appellee as that of the appellant, to pay the costs accruing in the suit of *Joel Carter v. The Village of Earlville*, as between themselves, and it appears from the evidence that at least appellee so regarded it in making the demand on appellant for the payment of one-half the costs of the first trial in 1878, which he refused to pay.

These costs were due to the officers of the courts in which the suit was, or had been pending, and after refusal of appellant to pay under the verbal contract, as he had agreed to do, appellee might well, as between themselves, await the enforced payment thereof, and then compel appellant to contribute in accordance with the contract.

In the proceedings in this suit appellee was the party of record, and he alone was primarily liable for the costs; no fee bill or other process could issue to enforce payment thereof from appellant. Having instituted the suit appellee's duty was to proceed therewith until determined, and the test established,

to effect which the suit was commenced, and then compel the performance of the verbal contract for contribution, if not performed voluntarily. Or the appellee might have abandoned the further prosecution of the suit after refusal of appellant to contribute his proportion under the verbal contract, and have enforced the contract against him.

This contract was in the nature of a continuing one; it contemplated, as the counsel for appellant have well said, that the appellee was to go on and pay all costs of the test case, and afterward be reimbursed by appellant for the one-half of the amount so expended.

In the case of *Walker v. Goodrich*, 16 Ill. 341, which was an action by an attorney for services in defending a suit in chancery, the service commencing in 1840 and not having terminated at the time of the hearing, in 1855, the court held that the statute of limitations for the performance of a duty or employment, could not commence running until the service, duty or employment had been performed by the termination of the suit, or the contract of retainer had in some other mode been determined; in other words, was a continuing contract. There was a suit pending in court for more than twelve years, requiring almost daily attention for a large part of that time.

The court asks: "Did the statute of limitations commence running at the termination of each day as to the services rendered on that day? Were the attorneys obliged to pause in their defense within each period of five years to commence suit against their client for the services already performed, or forfeit them? The very statement of the proposition shows how embarrassing, inappropriate and, indeed, impracticable such a rule would be."

The case of *Darwin v. Smith*, 35 Vt. 69, is in point; its similarity will be apparent from the opinion of the court, which in part we quote: "This case shows that the plaintiff was to make disbursements for the expenses of the suit, and that when those expenses were ascertained they were to be adjusted between the defendant and himself according to the defendant's agreement."

"The plaintiff could have no cause of action until he had made the necessary payments resulting from the suit. * *

* As the plaintiff's cause of action did not accrue until the expenses of the suit were, in fact, paid by him, the plaintiff was entitled to a verdict for one-half of the expenses paid."

We therefore conclude that this objection is not well taken.

The instructions of the court given to the jury, although not in full accord with the rule stated, were far more favorable to the appellant than as here expressed, of which appellant can not complain, and no cross-errors having been filed by the appellee, and finding no error in the proceedings of the court below requiring our interference, the judgment is affirmed.

Judgment affirmed.

IN RE ESTATE OF GEORGE CASHMAN, DECEASED.

Wills—Construction—Rules—Life Estate—Remainder—Limitation of—Sale of Lands—Election—Right of Widow to Have and Hold a Certain Sum in Cash.

1. In the construction of a will the intention of the testator, if not inconsistent with the rules of law, governs; and his intention is to be ascertained from the whole will and all its parts taken together. Every clause and provision should be given effect, if possible, according to his intention.

2. In the case presented, the second clause of the will in question gave to the widow a life estate in a certain tract of land, with power of election in her vested to have said land sold by the executors, and to accept instead thereof \$3,000 in money, to be accepted and held by her during her natural life, with the remainder, "or so much thereof as may remain unexpended," if any, to the testator's children, the same "to be accepted and held" and by her used and expended in her discretion for her own use and benefit.

3. The words, "or so much thereof as may remain unexpended," in law and fact, import a power of disposition in the widow and create a limitation of the remainder after the termination of her life estate.

[Opinion filed December 8, 1888.]

In re Estate of George Cashman.

APPEAL from the County Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding.

MESSRS. WILLIAMS, LAWRENCE & BANCROFT, for appellant.

The Supreme Court of this State has often held that a life estate may be created with power of disposition in the life tenant, and limit a remainder after the termination of the life estate. *Kaufman v. Breckenridge*, 117 Ill. 316; *Markillie v. Ragland*, 77 Ill. 98; *Hampton v. United States Express Co.*, 107 Ill. 443, and numerous other cases.

It will be sufficient if from the entire will any right of management and control can be gathered. Can such an inference properly be drawn from the will in question? The testator leaves his widow a valuable eighty acres of land for life, and thinking that its sale might assist in selling the adjoining lands of the estate, he gives her the option of receiving, in case she sold the land, the sum of \$3,000 in money, to be accepted and held by her, as provided in reference to real estate, during her natural life.

The Supreme Court of this State have construed words not so strong as these, for the word "unexpended" did not occur in the case, but instead simply the words, "whatever may remain." We quote: "But the first part of the next clause seems to remove all doubt. He there declares it to be his will that whatever remains of his estate, real and personal, at the death of his wife, should descend to his heirs according to law. Had he not intended that his wife should have power to sell his real estate, why speak of what should remain of it at her death?" *Markillie v. Ragland*, 77 Ill. 102.

So in this case. If the testator had not intended that his wife should have the power to expend the personal estate which he had directed she should accept and hold, why speak of what should remain unexpended at her death?

The testator doubtless contemplated that the benefit his real estate would receive from the sale of the land given to the widow, by her consent, would more than compensate for any impairment her expending any portion of the principal would entail.

This is not an open question in this court. Your Honors have, within the past year, passed upon the very words that occur in this will, and have held the construction for which we contend. *Pritchard v. Walker*, 22 Ill. App. 286.

Mr. FREDERICK A. WILLOUGHBY, for appellees.

UPTON, J. The sole contention upon this appeal is upon the construction of the second clause in the last will and testament of the late George Cashman, which will was duly admitted to probate in Knox county, a copy of which clause is as follows:

"Second. I give, devise and bequeath unto my beloved wife, Rebecca Cashman, the following described real estate, to wit: The south half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of section seven (7), in township nine (9), north of range two (2), east of the fourth (4th) principal meridian, situated in the county of Knox and State of Illinois, together with all hereditaments and appurtenances thereunto belonging or in any wise appertaining during her natural life; also one milch cow, to be selected by her, and all the household furniture, of every name and nature whatsoever, during her natural life; all of said property to her devised and bequeathed, to be received and accepted by her in lieu of dower and homestead: *Provided*, however, that she, my said wife, may elect to have the above described real estate sold and conveyed by my executors hereinafter named, in connection with my adjoining land or lands (if by them deemed for the best interests of my estate), and accept in lieu thereof the sum of three thousand (\$3,000) dollars in money, to be accepted and held by her, as above provided, in reference to said real estate during her natural life, and that after her death all of the said property to her devised and bequeathed (or so much thereof as may remain unexpended), to be converted into money by my executors, and the net proceeds thereof to be divided equally between all my children and their descendants according to law, except the descendants of my son John Cashman, deceased, to wit, my grandsons George Cashman and John Cashman, who are

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hereinafter provided for by a specific allowance or legacy in full of all interest in my said estate."

The land mentioned in and devised to Rebecca Cashman by the will, was, by her election, sold by the executors of the estate as authorized by the will. Mrs. Cashman joined in the conveyance and accepted and received and now holds the sum of \$3,000 in lieu thereof. The money was paid to her as devisee under the will by her co-executor, J. L. Cashman.

In the executor's report, presented to the Probate Court of Knox county for allowance, this item or fund of \$3,000, so paid the widow, Mrs. Cashman, as devisee, was charged to the estate and a corresponding credit given to the executors therefor.

Objections were filed in the Probate Court by a portion of the heirs of said estate to the allowance of that charge or item, with others, in the report. The Probate Court overruled the objections and allowed such item or charge of \$3,000, so paid, to the credit of the executor, and accepted the report.

From which finding the matter was appealed to the Circuit Court of Knox county, which, upon hearing, entered an order or decree "approving and affirming all of the said report of the executors, except such part as relates to the sum of \$3,000, claimed by the executor to have been paid Rebecca Cashman, widow of said deceased, in lieu of the eighty acres of land, and as to such sum of \$3,000 the court finds that the said Rebecca Cashman has only a life estate therein and thereto under the will of her husband, the said George Cashman, deceased, and as such was not entitled to have, hold, use or impair the said principal sum of \$3,000, but only to the interest, use and profit thereof during her natural life; that at her death the whole of the said \$3,000 belonged to the estate of the said George Cashman, deceased, and that the executor should account to the estate for that sum," etc., and in that particular reversed the judgment and order of the County Court sitting in probate.

From which order, finding and judgment of the Circuit Court the matter was, by the executor, appealed to this court,

The rule of law, in this State at least, is well settled that by a last will and testament one may create a life estate, with power to sell and convey the fee, and limit the remainder after the termination of such life estate. *Hawkins v. U. S. Ex. Co.*, 107 Ill. 443; *Welsh v. Belleville Savings Bk.*, 94 Ill. 202; *Kaufman v. Breckenridge*, 117 Ill. 305, and cases cited.

It is a principle of general application that the intention of the testator, if not inconsistent with the rules of law, must govern in the construction of a will. This intention is to be ascertained from the whole instrument, with all its parts and clauses taken together. Every clause and provision, if possible, should have effect given it according to the intent of the maker. A later clause, when repugnant to a former provision, is to be construed as intending to modify or abrogate the former clause.

It is contended by the appellant that, by the provisions of the second clause of the will in question, Rebecca Cashman took a life estate in the \$3,000 mentioned therein, with the right to appropriate to her own use, and expend so much thereof, both principal and interest, as she thought proper, and if any part thereof should be left at her death, such part so remaining should be divided among the heirs of the estate, as provided by the will.

The appellee insists that Rebecca Cashman took only a life estate in the eighty acres of land, or the \$3,000 which, by her election, was substituted in lieu thereof, without the power of use or disposition of the same, or any part thereof.

The general rule is, that, where a power of disposal accompanies a bequest or devise of real estate, the power of disposition is only co-extensive with the estate given. If the estate be for life only, the power of disposition is limited to such an estate as the tenant for life could convey, and since his estate was for life only, he could convey no greater estate than he possessed, unless there are other words clearly indicating that

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a larger power was intended. *Kennedy v. Kennedy*, 105 Ill. 350; *Henderson v. Blackler*, 104 Ill. 227; *Boyd v. Strahan*, 36 Ill. 355, and cases cited.

The rule is also clearly stated in *Kennedy v. Kennedy*, *supra*, that in cases of the character above referred to, the main inquiry should be the intention of the testator, and if that can be satisfactorily ascertained from the will, interpreted in the light of the surrounding circumstances, that intention should prevail over any artificial or technical rule of construction.

It is also clear as a principle of law, "*ex necessitate rei*," that a life estate in personal property gives the donee the right to consume such articles as can not be enjoyed without consumption, and to wear out by use, such as can not be used without wearing out.

Applying the rule, on principles hereinbefore stated, to the case at bar, it must be apparent that the testator contemplated that his wife should take a life estate in the eighty acres of land in the will described, with power of disposition at her election, and that the specific legatees named in the will at the death of his wife, should take the remainder, limited to the right of the wife in her life to use or expend for her own benefit, such portion thereof as she might choose to appropriate. In no other view can full effect be given, in our judgment, to each clause of the will.

The construction claimed by the appellee would render wholly nugatory the clause, that after the death of his wife the property so devised and bequeathed to her, "*or so much thereof as may remain then unexpended*," etc.

It will scarcely be claimed that this clause is meaningless, or is ambiguous, for the reason that the testator has in express terms given the wife a life estate only, and that by giving effect to this clause, the estate would be enlarged to a fee, by the granting of a power of disposition to the wife of the whole devise as claimed by counsel for the appellee.

At best the above rule would be a technical rule of construction and would defeat the manifest intention of the testator in the case at bar. This rule, if indeed it be of authority

in certain cases, can not apply to the case at bar as we have shown.

We need not, however, further discuss the point here involved. It is settled, as we regard it, by the determination of the judicial tribunals in this State, at least, that the words as used in the second clause of the will here in question, "*or what remains unexpended*," or equivalent words, do, in law and fact, import a power of disposition in the person to whom such devise or bequest is made and create a limitation of the remainder after the termination of such life estate.

In other words, as applied to the case at bar, the second clause in the will and the language used therein, legally construed, pass to his wife, Rebecca Cashman, the right to have, receive and expend for her own use and benefit the \$3,000, and the income therefrom, as she may see fit, during her natural life, and that part or portion thereof which remains at her death (if anything) unexpended, is to be divided among the legatees in the will named. *Pritchard v. Walker*, 22 Ill. App. 286; *Pritchard v. Walker*, Affd. 121 Ill. 221; *Hamlin v. U. S. Ex. Co.*, 107 Ill. 443; *Kaufman v. Breckenridge*, 117 Ill. 305.

There is another view bearing upon this question, perhaps not unworthy of notice. The language contained in the clause under present consideration in express words, gives to his widow the right to *have* and to *hold* the \$3,000 here in controversy. The language is, referring to this \$3,000, so "to be accepted and *held* by her as above provided in reference to said real estate during her natural life, and that after her death all of said property to her devised and bequeathed, or so much thereof as shall remain unexpended, to be converted into money, * * * and the net proceeds thereof to be divided," etc.

Clearly, the language is express that his wife was to accept and hold the \$3,000 during her natural life, with the right and power to manage and control the same, certainly to the same extent as she could have done with the land before it was converted into money by her election. It would not be claimed that as to the land, she had not the right to the possession and control thereof during her natural life.

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Did the sale of the land and the substitution of the money for it, abridge the rights of the wife therein or thereto, to hold and control the same? It is clear she could not have the same power, right and control of the \$3,000, if the entire possession thereof was denied her, as if she was possessed thereof, even if the use of it was her only interest therein.

It avails nothing in the argument to say the devisee in this case is a woman, and therefore to be presumed, in some degree, incapacitated to make use of, or safely invest the money to her interest, or the protection of the fund. It is the determination and application of legal principles in the construction of language used, in cases of the character before us, rather than an inquiry as to fitness of the beneficiary to be intrusted with the fund; that we have to determine in this case. We are satisfied that from a just legal construction of the will here in question George Cashman, deceased, gave to his wife eighty acres of land for her natural life in lieu of dower and homestead in his estate, with the power of election in her vested, to have said land sold by the ("his") executors, and to accept instead thereof \$3,000 in money, which was to be by her accepted and held, as provided in reference to said land, during her natural life, and that after her death all the said property devised and bequeathed to her, which remained unused or unexpended by her in her lifetime, to be converted into money by his executors, and the proceeds divided among his children as in his will stated. In our judgment the case at bar is fully within the principles announced in the case of *Pritchard v. Walker, supra*.

That the words contained in the second clause of said will "or so much as remains unexpended after her death" clearly indicate an intention on the part of the testator that his wife, Rebecca Cashman, might use and expend the whole or any part of the principal as well as the interest, or benefit derived therefrom, for her own use and benefit, if she should choose so to do, without in any way or manner being compelled to account to the said estate therefor in whole or in part, seems to us clear.

That, for that purpose, the said Rebecca Cashman was and is entitled under said will to the actual possession and control of the \$3,000 here in controversy, and to the same extent as to the other personal estate to her bequeathed, and that the co-executor, J. S. Cashman, rightfully paid the same to her, and should be allowed therefor, as charged in his account filed in the said County Court, sitting in probate in the matter of said estate.

The judgment of the Circuit Court is therefore reversed in that particular and affirmed as to residue thereof, and the cause is remanded for further proceedings therein, not inconsistent with the judgment herein expressed.

Reversed in part and remanded.

JOHN B. COLTON, EXECUTOR,

V.

FIELD & LEITER ET AL.

Administration—Final Account—Insolvent Estate—Release by Part of Creditors of Claims against Estate—Compensation of Executor—Rights of Remaining Creditors.

1. The rule that a trustee can make no profit out of his office, applies to all who hold fiduciary relations, and includes executors and administrators.

2. Where the executor of an insolvent estate is released from the payment of further dividends by part of the creditors thereof, the remaining creditors are entitled to a *pro rata* distribution of any fund thereafter arising.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Knox County; the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. WILLIAMS, LAWRENCE & BANCROFT, for appellants.

The rule inhibiting a trustee to purchase from or sell to himself as such, is for the protection of the *cestui que trust*

It concerns no one else. The *cestui que trust*, being *sui juris* and otherwise competent to contract, may request such dealing, or upon notice and full knowledge either ratify and confirm or disaffirm it at his pleasure. 4th Kent (11th Ed.), Sec. 438, and note; Perry on Trusts (2d Ed.), Sec. 198; Thorp v. McCullum, 1 Gilm. 627; Follansbee v. Kilbreth, 17 Ill. 522.

The privilege is his alone, and for his sole benefit and advantage. Under no circumstances can it inure to the advantage of another save by the will and wish of the *cestui que trust* affirmatively expressed. Perry on Trusts (2d Ed.), Secs. 198, 428.

In the case at bar, the action of the executor was taken at the request of the great majority in number and amount of the creditors of an estate known to be insolvent, to the end that they might thereby realize something more than could be hoped for under statutory and usual management. As the administration progressed they were fully advised as to what the executor was doing. At its conclusion a full, accurate and detailed account of his methods, doings and the result was spread out before them for examination, criticism, approval or disapproval. They heartily approved the result attained, emphasizing such approval by releasing the executor from further liability as to their respective claims allowed against the estate. This they might lawfully do, since such interests were personal to them, each separate and distinct from every other. In, and to them, and to the dividends collectible thereon, no other creditor had any right, title or interest whatever. As to them, each for himself might rightfully do what he would with his own. So heartily content, so thoroughly satisfied were they with the outcome that they, of their own motion, under their hands and seals, stated such approval and satisfaction that the executor should retain the perquisites allowed him by the County Court and any incidental benefits, if any, derived from furnishing the goods which his statement of account showed he had furnished.

That this was their deliberate intent upon full knowledge of the facts is clearly evident. But since a man may rightfully do what he will with his own their right so to do is clear.

There was nothing in the relation of trustee and *cestui que trust* to prevent their so expressing their approval of his conduct in the premises. Bispham's Equity (2d Ed.), Sec. 237, p. 398; Perry on Trusts (2d Ed.), Sec. 428, and note 1; Harwood v. Robinson, 14 Ill. App. 565.

Messrs. FREDERICK A. WILLOUGHBY and N. W. BLISS, for appellees.

Mr. Colton claims, in the language of the stipulation, that after paying appellees their *pro rata* share, he "is entitled to the balance of said amount as against the creditors who have filed said receipts, or against the estate." By the payment of this trifling amount, about \$500, and retaining the balance, amounting to about \$3,500, he expects to comply with the decision of the Appellate Court, that the executor could not be allowed to make a profit in his dealing as executor with himself as a private individual.

This money is part of the assets of the estate, and as such belongs to the creditors.

In 1878 certain creditors, by a receipt in full, discharged the executor from further liability on account of their claims against the estate.

The release or receipt of these creditors could not inure to the personal benefit of the executor, and as such it was a release to the estate.

This is evident from the very language of the receipt. They "release the said John B. Colton from further liability as such executor, on account of our respective claims against said estate."

No assignment of their claims or of the balance of such claims is here made directly or inferentially. Colton has made unusual exertions and incurred risk of extra trouble and personal loss by reason of the illegal proceedings, at their request, in administering the estate, and now they approve his course and release him as executor from further liability to them. This is no sale or assignment of their claims to Colton; it is *in totidem verbis* a release to the executor, that is, to the estate.

This amount of \$3,879.34, which, under the decision of the Appellate Court, the executor must account for to the estate is, of course, assets of the estate, for the payment of the indebtedness of the estate. Upon it, as upon all other assets, the creditors have a claim for the satisfaction of the indebtedness of the estate to them. The receipt by a portion of these creditors does not put the executor in the position of a creditor *pro tanto* of the estate. Such was not the intention of the creditors, nor the legal effect of their receipt. They having receipted to the estate, and being still content with such action, the money in question must be applied to the payment of such claims as remain unsatisfied and undischarged, viz., the claims of appellees and the other creditors who have not receipted to the estate.

If, however, the creditors had intended and attempted to assign their claims to Colton, such assignment would not inure to his benefit, but to that of the estate.

“Nor, if an executor compound debts due from the testator, or buy them in for less than their amount, shall he be personally entitled to the benefit of the composition; but other creditors, or the legatees, or the party entitled to the surplus, shall have the advantage of it.” Toller’s Law of Executors (4th Am. Ed.), p. 481.

All savings and profits made by an executor out of the funds of the estate, or in the payment of claims at a discount, or in depreciated paper, belong to the estate, and become assets for the payment of debts and distribution. *Wingate v. Pool*, 25 Ill. 118.

In the above cited case the Supreme Court affirm the well known doctrine that all profits made by an administrator belong to the estate, and apply it to the case where an administrator paid off certain notes to a bank with paper of the same bank which he had bought on the market at a discount with his own funds, and compel him to account to the estate for such profit. He did not, indeed, claim to be the “equitable assignee” of these notes after he had taken them up, and insist that they should be kept on foot for his benefit, as does the executor in the case at bar, but such a claim, if made,

would not have been sustained by the court, for such administrator could not be allowed to indirectly make a profit out of the estate.

URTON, J. On the eleventh day of December, 1870, appellant filed in the County Court of Knox county his final report and account as executor of the estate of one E. F. Thomas, deceased, and asked of that court the allowance and approval thereof and that he be discharged as such executor. To this application, appellees, who are creditors of the estate, objected, and filed in that court, severally, specific objections thereto, charging the executor with neglect and mismanagement in many particulars, to their injury.

A hearing was had on this application in the County Court and the objections were not sustained; the amount as filed was allowed and the executor was discharged, from which appellees appealed to the Circuit Court, wherein the order of the County Court was affirmed, and the case was then further appealed to this court, where a hearing was had at the June term, 1880, and the judgment of the Circuit Court was reversed and the cause remanded with directions, which will be found in Vol. 7, Appellate Court Reports, at page 379 thereof.

Upon this remand, the executor restated and refiled his final account in said County Court as follows:

"Statement of account under finding of court.	
"Charge.	
"To amount of reductions on bills furnished estate store by order court with all profit and discount off. Ex. A.....	\$2,320.00
"To excess of Commissioner's Ex. B.....	147.06
	<hr/>
	\$2,467.06
"To interest on above from Dec. 23, '76, to date, July 1, 1886.....	\$1,412.28
	<hr/>
"Balance on hand.....	\$3,879.34"

A hearing was had upon this report and amount as restated, and as to the distribution of the balance so reported in the

hands of the executor, the County Court made an order in substance as follows:

“This cause coming on to be heard, being remanded from Circuit Court for restatement of account, and for an order of distribution, the executor having filed his final report showing balance on hand of \$3,879.34. * * * Ordered that the executor first pay Field, Leiter & Co. and H. W. King & Co., each the sum of \$300 for their expenses in and about the resisting of the discharge herein, and that the balance be distributed *pro rata* among all creditors of said estate who have proved their claims against the estate in proper time.”

From which order both appellant and appellees prayed an appeal to the Circuit Court of Knox county. The cause was heard in the Circuit Court and upon that hearing a receipt and release by a large number of the creditors of said estate to the appellant as executor was put in evidence, which in effect was as follows:

“In the matter of the estate of E. F. Thomas, deceased, late of Galesburg, Illinois.

“At the outset of the executorship of John B. Colton, executor of said estate, he was requested by E. S. Jaffray & Co., of New York, and other creditors of said estate, representing three-fourths in number and amount of the entire liabilities against said estate, to obtain from the County Court of Knox county, Illinois, an order permitting him to continue the business of said E. F. Thomas for such reasonable time as he deemed necessary for the advantageous sale of the stock of goods on hand belonging to said estate.

“Such order was made by said court, the necessary supplies were purchased by said Colton, executor, under said order, and the estate fully administered upon thereunder by him in accordance with the wish of said creditors, and the entire net proceeds of said estate distributed to the creditors, amounting to forty-six and five-eighths per cent. of their respective claims. And said executor having filed in said County Court his final account current accompanied with the proper vouchers, and the judge of said court having examined and approved of the same, he entered a final order declaring the estate in-

solvent, and discharging said executor from further liability thereunder. Now, in consideration thereof, and for other good and valuable considerations by us received through the unusual exertions used by the said Colton, executor, and personal risk, extra trouble and personal loss by reason of acting under and carrying out the order of said court in the interest of said estate, we do each and every of us respectively approve the course of said Colton as aforesaid in the management of the said estate and release the said John B. Colton from further liability as such executor, on account of our respective claims against said estate of E. F. Thomas, deceased. Witness our hands and seals set opposite our respective claims."

Which was signed, with seals attached, by some thirty in number of the creditors of the estate, and representing in the aggregate about \$45,000 of claims.

It was stipulated in the court below that appellees were unpaid creditors of said estate; that the aggregate amount of their original claims was about \$5,000, upon which had been paid, in due course of administration, about forty-six and five-eighths per cent., and for which unpaid balance no release or discharge had been given.

At this hearing the executor sought to obtain an order accepting and approving his account and report as restated, and his discharge as such executor, upon the payment to the appellees and other unreleased creditors (the appellees were the only creditors objecting to such distribution and discharge) of their *pro rata* share of this balance of \$3,879.34, then remaining in the hands of the appellant as such executor.

The appellees contended that as all the other creditors of said estate, or substantially all, had released their claims to any further share therein, they were legally entitled to the entire fund so remaining in the hands of the executor in satisfaction of the full unpaid balance of their claims, as well as those of other than released creditors of the estate, if any, if sufficient for that purpose, and if not, to share *pro rata* with such other unreleased creditors.

That the release and discharge of the executor prevented all further claim to, or right of participation in the fund or bal-

Colton v. Field & Leiter.

ance found remaining in the hands of the appellant as executor, by the releasing creditors, but did not divert or charge it as assets of the estate for distribution among the existing creditors of the estate, nor transfer the same in whole or in part to appellant in his own right. The Circuit Court on hearing entered the following order or decree in substance:

“And now this case coming on for hearing, and the court having heard the evidence in the cause and the argument of counsel for the respective parties hereto, and being fully advised in the premises, doth order, adjudge and decree that the fund or money heretofore accounted for by the executor herein in his report or account current made by order of this court to the County Court of this county, be paid to the objectors, Field, Leiter & Co., Henry W. King & Co., and all other creditors whose claims have been previously not released or satisfied, in satisfaction of their claims against the estate of E. F. Thomas, deceased, if the same shall be sufficient to satisfy said claims, and if not sufficient, then the same shall be applied *pro rata* on said claims.

“It is further ordered that the costs in this case, including all costs that have been incurred in this, as well as in said County Court, upon the application of said John B. Colton, executor as aforesaid, shall be paid by the said John B. Colton, but not out of funds belonging to the estate.”

From which the executor appeals to this court and assigns for error:

1st. The entry of the decree of distribution.

2d. In not limiting the amount of distribution to be paid appellees and other unreleased creditors to the *pro rata* share of each in the fund in the executor's hands, all claims allowed against said estate being considered.

3d. For other errors apparent in the record.

The question presented by this record is, to whom does this fund or balance in the hands of the executor of \$3,879.34 belong? This determined disposes of the whole case and includes all errors assigned substantially.

The balance now in the hands of the appellant executor was produced in restating the final account of the executor in con-

formity with the judgment of this court, wherein we held the executor was not entitled to retain the various items which, in the aggregate, make such balance. These items were not allowed the executor for the reasons stated in the opinion of this court before cited.

It was the products of claimed profits, to which appellant was not entitled, of \$2,467.06, on which interest was computed from December 23, 1876, to July 1, 1886, in the sum of \$1,412.28, aggregating this balance of \$3,879.34.

Manifestly this is assets of said estate, and belonged to its creditors for the satisfaction of legal claims against it.

Who are its creditors? Not the executor; he is entitled to compensation only as provided by law which has been fully paid. Not by virtue of the release under seal to the executor by the relinquishing creditors, for that does not purport to be an assignment (if, indeed, that could in this case be availing) by such creditors to the executor, of the further distributive share which they might have received, but for such release.

The most that could be said would be that this fund, or that portion of it claimed by the executor here, did, in fact, arise from the savings and profits made by the executor out of the funds of the estate or in the payment of claims at a discount, and, as such, become assets of the estate. *Wingate, Admr. v. Poole*, 25 Ill. 118.

But it is said the relinquishing creditors intended the further distributive share to which they might be severally thereafter entitled should be held by the executor as his own, and that such release be held and treated as an equitable assignment to him of such *pro rata* share as compensation for his extra care and attention to the duties of said trust and the enhanced benefits to the creditors of said estate.

That the entire assets of this estate in the hands of appellant is a trust fund of which he was, and is, a trustee, can not admit of doubt. It is the law, founded on the plainest principles of common sense and public justice, that a trustee can make no profit out of his office, and the reason on which this principle rests is that a trustee shall be placed in no position where his interests may be opposed to his duty.

The rule that a trustee can have no allowance or compensation for his time and trouble in the execution of his trust, is the well settled doctrine of equity, and this rule applies, not only to trustees strictly so called, but to all who hold fiduciary relations, as executors, administrators, etc.

It avails nothing that the service, or the result of honest effort of such trustee, were productive of great benefit to the trust estate or promotive of great pecuniary advantage to the creditors thereof. As such trustee, his duty was, and is, to protect the trust estate and enhance its value and productions by all honest endeavors, and to dispose of it to the best possible advantage, not for his own gain or hope of reward, but from simple duty. That he may the more faithfully do this, the law seeks to shield him from temptation by an inflexible rule which will not permit him to palter with his own conscience and absolutely forbids him from occupying two positions inconsistent with each other—self-interest and official duty.

Regarding, as we do, the principle of law stated applicable to the case at bar, we can not yield our assent to the rule as claimed by appellant, even upon grounds of public policy alone.

All other creditors save appellees, so far as shown by this record, have executed and delivered under seal, to the trustee of this estate, a full and perfect acquittance and release of all and each of their claims upon the said estate, or to further distribution from the assets thereof, and such release and acquittance inures to the use and benefit of the said estate.

There being no other creditors of the estate, appellees are entitled to have satisfaction of their several claims to the full amount thereof, from the said balance now in the hands of the executor, and the judgment of the Circuit Court in that particular is affirmed.

The judgment of the Circuit Court as to the payment of costs by the appellant, John B. Colton, individually, is reversed, and the cause remanded to the Circuit Court with directions that it enter an order that the costs in this case including all costs that have accrued in the Appellate Court, as well as in

Circuit and County Courts, upon the application of John B. Colton, executor, as aforesaid, be paid by John B. Colton as executor, out of the assets of the estate in his hands, in the due course of administration, and in all other matters the judgment of the Circuit Court is affirmed.

CHICAGO & ALTON RAILROAD CO.

V.

DENNIS GLENNEY.

Railroads—Ditch—Damages for Flooding Plaintiff's Lands—Former Adjudication—Limitations—Want of Plea—Stipulation.

1. An action lies against a railroad company for damages where, by making new and unnatural channels, it has thrown surface or other water upon the plaintiff's lands.

2. In the case presented, the defendant is concluded by a former adjudication.

3. The defense of the statute of limitations can only be interposed by plea. A stipulation limiting the plaintiff's claim for damages within five years is not equivalent to a plea of the statute of limitations, nor does it amount to a waiver thereof.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Will County; the Hon. GEORGE W. STIPP, Judge, presiding.

Mr. WILLIAM BROWN, for appellant.

The appellant was the owner of a strip of land one hundred feet wide from Braidwood to Kilgore slough. It made use of it for a lawful purpose, *i. e.*, the construction and operation of a railroad. The construction and operation of the road is, in a legal sense, a unit, which includes the doing of all legal acts necessary to the accomplishment of the end. The cutting of ridges, the filling of low places, and the ditch-

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ing along the road bed, as well as the laying of rails and running of trains, are all lawful acts of enjoyment of properties and franchises, and it is contended that so long as the railroad continued to use its property in a lawful manner, no injury which therefrom results to another is an actionable injury.

It is legally confessed, since there is no averment to the contrary, that all of the acts and doings of defendant were necessary to the exercise of its franchises, and that its work was skillfully performed. These cases are common in the courts of the various States, and we beg the consideration of some of them. *Shane v. Kansas, etc., R. R.*, 71 Mo. 237; *Abbott v. Kansas City, etc., R. R.*, 83 Mo. 271; *Jones v. St. Louis, Iron Mt., etc., R. R. Co.*, 94 Mo. 151; *Moss v. St. L. R. R. Co.*, 85 Mo. 896; *Gannon v. Hargadon*, 10 Allen, 106; *Luther v. Winnissimmet Co.*, 9 Cush. 171; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19; *Morrill v. Hurley*, 120 Mass. 99; *Hoyt v. The City of Hudson*, 27 Wis. 656.

Probably the clearest cases upon this question are to be found in Indiana, where it is held that the railroad company has the right to dig ditches and build a levee within the limits of its own land, and is not responsible for consequences if they overflow the lands of adjoining proprietors. *Cairo & Vincennes R. R. Co. v. Stevens*, 73 Ind. 278; *Taylor v. Fickas*, 64 Ind. 167; *Schlicter v. Philipsy*, 67 Ind. 201; *Shelbyville, etc., v. Green*, 99 Ind. 201; *Weis v. City of Madison*, 75 Ind. 241; *Benthall v. Seifert*, 77 Ind. 302; *Cairo, etc., R. R. Co. v. Howry*, 77 Ind. 364.

In further support of the propositions here submitted we beg to refer to the following cases: *Goodale v. Tuttle*, 29 N. Y. 459; *Waffle v. N. Y. C. R. Co.*, 58 Barb. 413; *Imler v. Springfield*, 55 Mo. 119; *Dickenson v. Worcester*, 7 Allen, 16; *Parks v. Newburyport*, 10 Gary, 28; *Flagg v. Worcester*, 13 Gray, 601; *Bowlsby v. Speer*, 31 N. J. Law, 351; *Sowers v. Skiff*, 15 La. Ann. 300; *Martin v. Titt*, 12 La. 503; *Gibbs v. Williams et al.*, 25 Kan. 214; *Ang. on Water Courses*, p. 122, Sec. 108; *Gould on the Law of Waters*, Chap. 9, Secs. 263 to 272.

If any injury whatever has resulted to the property of the appellee by the construction of this railroad, it is a mere incident to the lawful exercise of the rights and powers which have been vested in it, and no recovery can be had for it. *Roberts v. Chicago*, 26 Ill. 249; *St. L., V. & T. R. Co. v. Haller*, 82 Ill. 210; *Murphy v. Chicago*, 29 Ill. 279.

There was a stipulation entered into between the parties that the plaintiff does not claim for injury prior to five years before the commencement of the action, which was in September, 1883. The legal effect of this stipulation was, that the plaintiff should show a cause of action arising within five years. If, then, the cause of action was co-existent with the construction of the road and ditch, which are expressly averred to have been the cause of the wrong, the fact that they were continued does not show a cause arising within the period of the statute. They constitute one permanent legal structure; the things are but parts of the whole. *C. & E. I. R. Co. v. McAuley*, 121 Ill. 160; *Powers v. City of Council Bluffs*, 45 Iowa, 652; *Troy v. Cheshire*, 3 Foster, 83; *C. & E. I. R. Co. v. Loeb*, 118 Ill. 203.

Messrs. R. M. WING & CHARLES F. GOODSPEED, for appellee.

All the circuit judges of the ninth judicial circuit, the Appellate Court of the second district and the Supreme Court of the State, have held that these facts entitle the plaintiff to a judgment against this appellant. *Chicago & Alton R. R. Co. v. Glenney*, 19 Ill. App. 639; *Chicago & Alton R. R. Co. v. Glenney*, 118 Ill. 487; *Chicago & Alton R. R. Co. v. Riley*, 25 Ill. App. 569; *Chicago & Alton R. R. Co. v. Connors*, 25 Ill. App. 561.

The foregoing decisions are in conformity with the previous decisions of the Supreme Court of the State on the same and kindred subjects. *J. N. W. & S. E. R. R. Co. v. Cox*, 91 Ill. 500; *Nevins v. Peoria*, 41 Ill. 502; *Giliham v. Madison Co. R. R. Co.*, 49 Ill. 484; *Hicks v. Silliman et al.*, 93 Ill. 257; *Stoddard v. Filgur*, 21 Ill. App. 563.

The appellant claims "that the ultimate controversy between the parties is whether the railroad company has the

right to drain its right of way of surplus water by ditches into this (Kilgore) slough, acting skillfully, without negligence, and not leaving its own property." That is not the contention in this case. Fairly stated the question is, can this railroad company select one of five distinct prairie sloughs, draws, depressions or watercourses, intercepted by its road, and by ditching through the banks of four of them, conduct their waters into the one selected. If it can legally ditch four into one, there is no legal reason perceived why it might not ditch four hundred into one.

C. B. SMITH, J. This was an action on the case brought by appellee against appellant in the Will County Circuit Court. There are four counts in the declaration, none of them substantially different. The gist of the complaint is that appellant, by digging a ditch along the side of its track for some distance, brought a large volume of water into a slough running through appellee's farm, which did not naturally run through the slough, and by thus increasing the volume of the water in the slough caused it to overflow appellee's land and thereby destroyed his meadow. The second count differs from the other three by alleging that the defendant, by its ditch, cut certain ancient watercourses and diverted the natural flow of the water out of their course through its ditch into the slough and then over plaintiff's farm.

The other counts only allege that by means of this ditch and the building of its road-bed the defendant gathered the surface waters from a large territory and brought it to the slough and thus on plaintiff's land, and that said surface waters would not have naturally gone into the slough and over plaintiff's land but for the ditch dug by defendant. To this declaration the defendant pleaded the general issue. There was also a stipulation in the case that the plaintiff would not claim for any damages accruing to him for more than five years preceding the commencement of the suit.

A trial resulted in a verdict for the plaintiff for \$572.40. A motion for a new trial was overruled and appellant brings the record here by appeal for review and assigns the usual

errors. We will consider only such as have been urged in the argument.

The facts as disclosed in this record are these: In 1886 the defendant was then the owner of a strip of land running through a level country lying between Braidwood and Wilmington, with numerous sloughs and slight elevations of the land crossing this strip of land, and on this strip defendant had before then built its road and was then operating it. In that year the defendant, in order to drain its right of way and protect its track, dug the ditch in controversy along the line of road running in a northeasterly direction to Kilgore's slough, and then emptied its ditch into that slough. Plaintiff's land lay a few rods below where the railroad crossed the slough, and where the ditch emptied its waters into the slough. The general inclination of the land and flow of water was in a northeasterly direction. In digging the ditch along the right of way it crossed some three or four sloughs similar to Kilgore's, smaller or larger, and also was cut through higher elevations along the track, so the water might from those sloughs follow the line of the track to Kilgore's slough.

This ditch was all on the right of way of the defendant and was properly made and necessary to the protection of the railroad track and the right of way from the waters falling on the surface and in the sloughs. There is a dispute in the evidence whether these sloughs, or any of them, were natural watercourses within the legal meaning, or were mere surface waters, gathered in the lower levels of the land.

Counsel for appellant contend very earnestly and in a very able and elaborate argument that the facts disclosed in this record do not show any liability on the part of the defendant. In taking this position counsel deny, first, that the ditch in controversy diverted any natural watercourse, and thereby caused its waters to flow on plaintiff's land. It contends that what plaintiff calls watercourses were, in fact, nothing but surface water seeking and lying on the lower levels of the undulating ground, without any of the elements of a natural watercourse, with banks, leaders and outlets, and second, that the water thus drained, being but surface water, the defendant having a right to free itself from it and in so doing

throw it on the lower land, it is not liable, under the law, even if damage did result to the lower heritage. In support of this argument and position taken, counsel cite us to a great array of cases from other States which support him. But the law in this State seems to be settled the other way upon the facts as disclosed in this record.

While it is the law of this State that the owner of the dominant heritage may, for the purpose of good husbandry, and equally so for the purpose of good railroading, gather the surface water that falls or flows upon him in a body or in individual channels and let it flow upon the lower heritage so accumulated without making himself liable in damages, yet this right will not give him the right to make new and unnatural ways for even the surface water. This right to protect one's self from the surface water falling on his own land gives him no right to erect dams and throw it back on another. *Gillham v. The Madison County R. R. Co.*, 49 Ia. 84; *T. W. & W. R. R. Co. v. Morrison*, 71 Ill. 616. Nor to remove natural embankments or cut ditches through natural barriers, so as to increase the flow of surface water on the lower heritage, when it would not have naturally passed over the surface in the direction in which it is taken by the ditch. *Hicks v. Silliman*, 93 Ill. 255.

These cases are sufficient to show the uniform holding of the Supreme Court of this State on the question involved in this record. The proof is clear that very much water was diverted from its original direction into this ditch and carried to Kilgore's slough, and thence over plaintiff's land, that never could have reached there by surface flowage nor by any other mode except for the ditch along the side of the railroad that had been cut through ridges and embankments, thus bringing the case strictly within the rule laid down in the cases above cited.

But aside from all other considerations upon this branch of the case, we regard ourselves as concluded by the former adjudication in other cases growing out of the same state of facts involved in this record in which the defendant had been held liable. In the former cases the same point of non-liability was urged by the defendant and the point

decided against it. In the former suit between the same parties the court held the defendant liable and affirmed the judgment of the Circuit Court. On appeal to the Supreme Court the judgment was reversed because the Circuit Court refused a proper instruction for the defendant, but we understand the ruling in that case to recognize the right of plaintiff to recover upon proper instructions, although it is not so stated in express words. C. & A. R. R. Co. v. Glenney, 19 Ill. App. 639; C. & A. R. R. Co. v. Glenney, 118 Ill. 487.

The defendant insists further that this claim was barred by the statute of limitations. Whether that be so or not, under a plea of the statute of limitations it is sufficient to say that no plea of that kind was interposed and without that plea this defense could not be made. Defendant insists that the stipulation made on the trial to the effect that plaintiff would not claim damages for any time beyond five years next before the commencement of the suit, was equivalent to such a plea. We do not think this agreement is equivalent to the plea of limitations. It amounted to nothing more than an agreement of the plaintiff to limit his right for the wrongs committed within five years and simply said to the defendant, you need not defend against anything done prior to that time. Such an agreement has not a single element of a plea of the statute of limitations, and, even if it had, the agreement by implication gave the plaintiff the right to recover within five years if he could prove his case. So that, if it be by courtesy called a plea of the statute of limitations, it contains an agreement that destroys its effect, except in so far as it cut the plaintiff off from everything back of five years, and it is therefore wholly immaterial whether it be called a plea or an agreement; its effect is the same. This agreement or plea precluded the defendant from raising the question of limitations raised and presented in the argument.

Upon a careful examination of the instructions given, refused and modified, we find no substantial error. The jury seems to have been fully and correctly instructed.

Finding no substantial error in the record, the judgment is affirmed.

Judgment affirmed.

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THE KANKAKEE COAL COMPANY ET AL.

V.

CRANE BROTHERS MANUFACTURING CO.

28	371
143s	379
28	371
206s	538

Mechanic's Lien—Petition to Enforce—Sufficiency of—Engine—Coal Lands—Contract—Time of Delivery—Rights of Mortgagees—Practice.

1. Upon a petition to enforce a mechanic's lien for a hoisting engine, it is *held*: That the petition shows with sufficient accuracy where the engine was to be placed; that, as the time within which it was to be furnished was not fixed, the law implies that it should be within a reasonable time; and that there was no error in excluding evidence.

2. When the contract, as set forth in the petition to enforce a mechanic's lien, is admitted to be correct, it is not error to refuse to allow the introduction in evidence of the original.

3. Where it is admitted, in a stipulation entered into for the purpose of dispensing with proofs, that certain notes are overdue and unpaid, a failure to produce the same upon trial, no demand having been made for them, is no ground for reversal.

4. One defendant can not assign for error matters which do not affect him, but only affect a co-defendant who is not complaining and has not appealed.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Kankakee County; the Hon. ALFRED SAMPLE, Judge, presiding.

Mr. STEPHEN R. MOORE, for appellants.

It is not the mere furnishing the materials or doing the labor which creates the lien, but it is the contract of the parties and the furnishing of the materials under the contract, which have that effect. *Kinney v. Sherman et al.*, 28 Ill. 520; *Cook v. Vreeland*, 21 Ill. 431; *Sutherland v. Ryerson et al.*, 24 Ill. 520.

I understand the law to be that the parties must contract with the agreement that the material must be used on a specific piece of land, and the proof must establish this contract.

The mechanic's lien law, being in derogation of the common law, and creating privileges and benefits not conferred

on other creditors, must be strictly construed. *Huntington v. Barton*, 64 Ill. 502.

The act will not be extended to cases unless they fall clearly within its provisions. *Carney v. Tully*, 74 Ill. 375; *Canisius et al. v. Merrill*, 65 Ill. 67; *Witherell v. Ohlendorf*, 61 Ill. 283.

There will be no claim urged that this machine was made under an express contract. No time was agreed upon for the completion of the engine. It is not so averred in the petition, nor sustained by the evidence. Defendants in error could not have been sued for a failure of the contract set out in the petition, if not performed in five years. It was claimed in the Circuit Court that a reasonable time was to be inferred in which it was to be built; but this does not meet the requirements of the law. In *Fish v. Stubbings*, 65 Ill. 492, the contract was that the defendant employed the petitioner to do the work and furnish materials at a stipulated price, one-half to be paid on the completion of the work, and the balance on or before the first day of January next following. That the work was commenced, and progressed with the assent of the defendant, and completed the following February.

The court says: "Here was a contract of employment, and the price and time of payment were fixed. It was clearly an express, as contradistinguished from an implied contract, but no time was agreed upon for the completion of the work. To entitle petitioner to a lien this was essential, and the law can not imply any time for completion under such circumstances. This omission is fatal to the petition." *Cook v. Vreeland*, 21 Ill. 431; *Peck v. Standart*, 1 Ill. App. 228; *Reed v. Boyd et al.*, 84 Ill. 66; *Belanger et al. v. Hersey et al.*, 90 Ill. 70.

Sec. 17 of the Lien Act provides that previous incumbrances shall be preferred to the extent of the value of the land at the time of making the contract, and the court shall ascertain what proportion of the proceeds of the sale shall be paid to the several parties in interest.

This was not done in this case. The mortgage creditors are entirely ignored in the decree, and the mechanic's lien is made the first lien. *Lunt v. Stephens*, 75 Ill. 507; *Power et al. v.*

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McCord, 36 Ill. 214; Martin v. Eversol et al., 36 Ill. 222; Croskey et al. v. Carey et al., 48 Ill. 442; Croskey et al. v. N. W. Mfg. Co., 48 Ill. 481; Tracey v. Rogers, 69 Ill. 662; Wood et al. v. Rawlings, 76 Ill. 206.

Mr. H. K. WHEELER, for appellee.

This contract was partly expressed and partly implied. No definite time was fixed when the engine was to be completed, but it was completed and accepted in ninety-seven days after the contract was made, and comes clearly within the rule laid down in Orr v. N. W. Mut. Life Ins. Co., 86 Ill. 261; Clark v. Manning, 90 Ill. 380; Grundeis v. Hartwell, 90 Ill. 324; Driver v. Ford, 90 Ill. 595.

As early as 1860, in the case of Burkhardt et al. v. Reisig, 24 Ill. 531, the right to maintain a lien for an engine was conceded. This was followed by the decision in Dobschuetz et al. v. Holliday, 82 Ill. 371, in 1876, under the mechanic's lien act of 1874. I can see nothing in either of these decisions in conflict with the lien law. In any event the doctrine of *stare decisis* ought to govern. The Supreme Court have placed a construction upon the statute. These parties are presumed to have contracted with a knowledge of what the law is and the construction placed on the statute by the Supreme Court.

Nothing is better settled than that one defendant can not urge error as to a co-defendant who is not complaining and who has not appealed. Reed v. Boyd, 84 Ill. 67; Hedges v. Mace, 72 Ill. 473; Van Valken v. Trustees, 66 Ill. 103.

LACEY, P. J. This was a petition to foreclose a mechanic's lien and to subject the premises, which were the lands of the coal mine of appellant, the Kankakee Coal Company, to sale for the payment of the purchase price of a "horizontal link motion engine for hoisting purposes," which was purchased and placed on the premises for use, and for which appellant coal company promised to pay \$2,200 in installments. The court, upon answer, evidence and stipulation, decreed a lien for the amount and interest, amounting to \$2,803.09. From this decree this appeal is taken.

Several objections are made by the appellants to the decree:

1. The petition is insufficient in that it fails to show that the contract for the purchase of the machine provided for its being placed on any particular tract of land. 2. No time was specified in the contract when the machine was to be furnished. 3. The court erred in sustaining the master's ruling in not permitting the defendants to put in evidence the written contract, under which the hoisting machine was manufactured. 4. The notes were not given in evidence for the machine, nor produced on the trial as accounted for.

We shall first consider the first point made in reference to the sufficiency of the petition as regards the place where the engine should be placed. The petition in this regard alleges "that, on the 14th day of March, 1883, * * * said coal company made application to your petitioner to furnish it, for use in its coal mine on the lands hereinafter named, one horizontal link motion engine for hoisting purposes, and that on the 14th day of March, 1883, your petitioner and the said coal company made a contract for said hoisting machine, to be delivered on board the cars in Chicago." The lands thereafter named in the petition were the W. $\frac{1}{2}$, N. E. $\frac{1}{4}$, and E. $\frac{1}{2}$, N. W. $\frac{1}{4}$, and S. E., N. E. Sec. 19, T. 32, Range 9, east; and the averment is that, "in pursuance of said agreement (appellees) delivered said hoisting engine to said coal company, and that it was then shipped to the land of said coal company and put in use on said coal land," etc. The averment in the petition as to where the machine was to be used when purchased is not as clear as it might be, but, taking the entire petition together, we think it sufficiently appears that the contract contemplated that the machine was to be used where it was placed on the coal lands of the appellant above named. The statement in the petition that by the contract the machine was "to be delivered on board of the cars in Chicago," does not negative the averment that by the contract it was also finally to be sent from there to be placed on the premises in question. That, we think, was also contemplated by the parties according to the contract mentioned in the petition, or at least implied from what it stated. The admission that the contract was made as stated

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in the petition strengthens the case, as, if the petition was insufficient, the appellants should have abided their demurrer. We think the petition is sufficient in the particular complained of.

We do not think the objection made, that the petition does not aver that the engine was only placed on the E. $\frac{1}{2}$, N. W. $\frac{1}{4}$, Sec. 19, T. 31 N., R. 9, in Kankakee county, is valid. While the petition makes this statement, it also makes the averment that the engine was placed and used on the entire coal lands of the company. The statement that the machine was placed on this particular piece of land does not necessarily negative the idea that it was placed on the entire property of the company, of which this eighty acres formed a part.

The second point in the objection, that no time was mentioned in the contract, when the machine was to be furnished, we think, under our present statute, is not well taken. The statute of 1874 makes contracts express or implied, or partly express and implied, enforceable.

The case of *Fish v. Stubbings*, 65 Ill. 492, was overruled in *Orr v. N. W. Mut. Life Ins. Co.*, 85 Ill. 261, and *Cloak v. Manning et al.*, 90 Ill. 380. The time in which the engine was to be furnished was not fixed, and therefore the law implies that it was to be furnished within a reasonable time, and valid under Sec. 1 of the Mechanic's Lien Act of 1874, R. S., p. 665, as being partly expressed and partly implied; and under the third section of the act, as the machine was furnished within a year from the date of the contracts, the lien attached. *Driver v. Ford*, 90 Ill. 595.

The court did not err in sustaining the master's ruling in not permitting appellant to introduce in evidence the written contract for the purchase of the machine. The appellants had already admitted the contract as stated in the petition, and no good purpose could have been served by admitting the written contract; and more especially as it was not pretended that it showed anything different from the one set out in the petition. This disposes of the third point. As to the fourth objection, in regard to the notes not being produced on the trial, we think if appellants had a right to call for their production, such right has been waived.

It was admitted that the notes had not been paid and there was no demand made for their production at the trial. They were past due, and no point of this kind was made in the court below, and we think the objection should not be allowed here, to reverse the decree.

Under the mechanic's lien law, the right to enforce a lien similar to this, was held in Dobschuetz v. Holliday, 82 Ill. 371.

The objection that the rights of the mortgagee, H. C. Konklin, are not protected by the decree, is not well taken. The party interested in that matter, Konklin, has not appealed, and appellants can not assign for error matters which do not affect them. The same may be said as to the rights of any others claiming mortgage or other liens. Reed v. Boyd, 84 Ill. 67. The objections against the decree are of a purely technical character, and without substantial merit. The decree appears to be just, and the amount for the engine due. The decree is therefore affirmed.

Decree affirmed.

JOHN T. HADFIELD ET AL.

V.

CYRUS L. BERRY.

Sales—Bailment—Conditional Sales—Trover—Evidence.

1. Where goods are sold for a stipulated price with the privilege of returning what remains unsold, or where it is agreed that the same may be paid for by a stipulated time or returned in good condition, such sale, as to third parties without notice, is valid.

2. Where the consignee is at liberty to sell and receive payment at any price he likes, but is bound, if he sells the goods, to pay for them at a fixed price and time, the transaction is a sale.

3. In the case presented, the goods in question were liable to be levied upon as the property of the vendee.

[Opinion filed December 8, 1888.]

Hadfield v. Berry.

IN ERROR to the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding

Messrs. McCULLOCH & McCULLOCH, for plaintiffs in error.

This is not the case of a conditional sale, where an attempt is made to retain title in the seller until the price is paid. It is simply a bailment of goods with power to sell, and an obligation to return all unsold goods at a certain day. Nor is it a case of "sale or return." Such contracts seem to stand upon the ground that the property is delivered upon the condition that unless returned within a time certain, or within a reasonable time, the seller has a right to treat the sale as absolute. In the meantime the property remains in the seller until he makes his election. Hilliard on Sales, p. 20, Sec. 3; Benjamin on Sales, Secs. 597-9; Hunt v. Wyman, 100 Mass. 198.

The case of Meldrum v. Snow, 9 Pick. 441, is directly in point. A brewer supplied a retailer with a large quantity of beer in the winter time, the retailer to pay for all he should sell during the season, loss by casualty to fall upon the brewer; and if any beer remained unsold at the end of the season, the retailer had the right to return it to the brewer, but the latter had no right to take it without his consent. Payments to be made semi-annually; profits went to the retailer and all losses by bad debts to fall upon him. In a suit between the brewer and attaching creditors it was held that the brewer was still the owner. And it was held that it made no difference that it was optional with the retailer to return or not. Citing Blood v. Palmer, 2 Fairfield, 414; Whitewell v. Vincent, 4 Pick. 452, n.; Long on Sales, 181, 199, 2000; Sargent v. Giles, 8 N. H. 325; Ayers v. Bartlett, 9 Pick. 159.

The case of Moss v. Stone, 5 Barb. 516, was replevin by the alleged seller against an officer making a levy on a stock of goods received by the debtor "as per bill * * * to sell and account for the amount of \$293.86, or return in as good condition as when taken." This was held to be a bailment and not a sale.

In Boston and Maine R. R. Co. v. Warrior Mower Company, 76 Maine, 251, Dunham had received machines to be

sold at certain prices of which he was to have a certain share for commission, the Mower Company to retain title until sold. This was held to be a bailment and not a sale.

In the *Weir Plow Co. v. Porter*, 82 Mo. 23, goods were consigned for sale under a special contract to return those not sold, or to settle for the same by note, as the company might decide. This was held to be a bailment and not a sale.

In the *Nevill* case, cited in *Benjamin on Sales, supra*, which was held to be a case of "Sale or return," it was decided that the title to the goods passed to Nevill "as soon as he, by his sale, had put it out of his power to return them." This carries with it an implication that until then the title remained in *Towle & Co.*, from whom he had received them.

The principle deducible from these decisions is that where goods are consigned for sale, all unsold goods to be returned at a certain time, the title remains in the consignor until it is transferred to a purchaser by the authorized act of the consignee. When goods are delivered upon a "sale or return" contract, the title remains in the proposed seller until, by reason of the default of the other to return in due season, he has elected to treat the sale as absolute.

There is a wide distinction between both classes of cases first mentioned and those where all forms of a sale have been gone through with and the seller attempts to retain title as security for the price. Any such attempt is in direct conflict with our chattel mortgage law, and therefore void.

Messrs. STEVENS, LEE & HORTON, for defendant in error.

Beginning with the case of *Brundage v. Camp*, 21 Ill. 330 and even earlier, the decisions of this State have been uniform upon this question of sales of personal property, and the doctrine laid down in that case is, that where all the forms of a sale have been gone through with, and a delivery made, a purchaser from the first purchaser would take title, although the conditions of the first sale had not been complied with. In the case of *Murch v. Wright*, 46 Ill. 487, this doctrine is reiterated.

In the case of *Lonergan v. Stewart*, 55 Ill. 44, the court held that when the identical thing delivered was to be returned,

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although in an altered form, it was a bailment; but when there was no obligation to restore the specific article, and the receiver was at liberty to return any other thing of equal value, he became debtor to make the return, and the title to the property was changed. That is, it was a sale.

Now, in the case under consideration, there is no claim that Koch Brothers were ever to return all those goods. The utmost that could be insisted upon is that they were to return such as were not sold, or store them. They had a right to return money in place of the goods, and under the language of this last decision, having that right to return the money, the transaction must be considered a sale.

We call the attention of the court specially to the case of *Bastress et al. v. Chickering*, 18 Ill. App. 198, and cases there cited, upon this question of an absolute sale. In the opinion, the court says: "The cases cited are authority for the doctrine, that where one party, by means of a contract, but without notice to the world, suffers the real ownership in chattels to be in himself, and the ostensible ownership to be in another, the law will postpone the rights of the former to those of the execution or attachment creditors of the latter, because to injure third persons by giving a false credit to such ostensible owners is the natural and probable result of the transaction."

LACEY, P. J. This was an action in trover commenced by the plaintiffs in error against the defendant in error in the Circuit Court of Peoria county, charging him with having converted to his own use a quantity of what is known as "Standard Fireworks," claimed to have been the property of the plaintiffs in error. The defendant in error was the sheriff of Peoria county, and by virtue of an execution issued in favor of a judgment and execution creditor of Koch Brothers, levied on the goods in question as the property of said judgment debtors, and afterward sold the same, amounting to some \$1,100 or \$1,200, to satisfy such execution. The question involved here is whether the fireworks were the property of Koch Brothers, so as to be liable to be seized by their creditors, or were the property of the plaintiffs in error. The

Koch Brothers, in 1886, were retail dealers in Peoria, in toys, fancy goods and fireworks, and had been in such trade about four years, and the plaintiffs in error were at the same time engaged as manufacturers and dealers in fireworks at Middletown, Connecticut, and New York City.

The goods were furnished by the latter to the former for sale under a certain contract or arrangement between them; and upon the nature of that contract, whether Koch Brothers were the mere agents or bailees of appellants, or the purchasers of the goods in such a way as to make them liable to seizure on execution as their property, depends the right of the plaintiffs in error to recover. The court below tried the case without a jury, and found in favor of the defendant in error, holding that, as against the judgment creditors, the property was that of Koch Brothers, and gave judgment against plaintiff in error for costs. From this judgment this appeal is taken. Counsel for plaintiffs in error insist that Koch Brothers were the mere bailees of the said goods, and that they were the legal owners, and that the same could not be seized and held as the property of Koch Brothers.

The decision of this case involves a consideration of the law applicable to conditional sales where the rights of third parties become involved, as well as the real nature of the contract between appellants and Koch Brothers. However the law may be in other States, in this State it is well settled that where property is sold and delivered by the vendor to the vendee it makes no difference what condition may be attached to such sale for the security of the purchase price, either by reserving a lien on the thing sold, or providing that the title shall remain in the vendor till the property is paid for, or condition of forfeiture for non-compliance with the terms of sale; as to innocent purchasers without notice and execution creditors, the absolute title in the property passes to the vendee, and all such conditions are void under our chattel mortgage act. *Brundage v. Camp*, 21 Ill. 330; *Murch v. Wright*, 46 Ill. 487; *Lonergan v. Stewart*, 55 Ill. 44; *Bastress v. Chickering*, 18 Ill. App. 198. The conditions and agreement, however, remain valid as between the parties themselves.

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Where property is sold for a stipulated price with the privilege to return the unsold portion, or sold to be paid for by a stipulated time or returned in good condition, the sale as to third parties who purchase without notice, is valid. *Warder v. Hoover*, 51 Ia. 491; *Martin v. Adams*, 104 Mass. 262; *Kinney v. Brodlee*, 117 Mass. 321; *Robinson v. Fairbanks*, 23 Reporter, 521.

There is no complaint by the plaintiff in error but that the court held the law for him as favorably as he could desire, but that the court found the facts against him contrary to the weight of the evidence. The propositions asked by the plaintiff in error to be held for them, which were refused, were properly rejected. First, the court was asked to find for plaintiffs in error on portions of the evidence, and then all the evidence, which was simply asking the court to pass on questions of fact which the law does not require the judge to do in that form; second, the plaintiffs in error got the benefit of the law as favorably as they could ask. The court held in substance that the law was, if the goods were held by Koch Brothers, as bailees of plaintiffs in error, then they should recover; but the court found from the facts that they did not so hold the goods. If we understand the contention of counsel for plaintiffs in error, it is that the nature of the contract between Koch Brothers and them as to the fireworks was, that the goods were to remain with the latter as the goods of plaintiffs in error, subject to be sold by Koch Brothers, until July 10th, when the portion remaining unsold was to be returned to them either at the factory or by storing them in Peoria; that at no time did Koch Brothers, either before or after the 10th day of July, have the option to pay for the goods in cash, or return them and cancel the debt. That the contract was to pay for only such of the goods as they might sell, and no debt was created for the "unsold residue." The plaintiffs in error attempt to support their claim by the evidence of Charles B. Bidwell, and of the plaintiffs in error and John B. Kennedy, Jr., their agent. But all the evidence and circumstances should be taken together in determining the real character of the transaction. What we must now deter-

mine is, was there evidence from which the court below could properly find that the arrangement about the fireworks was a sale within the meaning of the law.

It appears from the evidence that Koch Brothers had been dealing with plaintiffs in error concerning their fireworks in a similar manner since 1884. They show a letter from John B. Kennedy, Jr., dated April 7, 1884, to Koch Brothers, in which he was making propositions to them in behalf of his principals to handle the fireworks, and in pursuance of which they did handle them in 1884 and 1885, which reads as follows: "The proposition made by me and sanctioned by H. & B. was that you return any goods you have left, if you wish, at no expense to us, and ten per cent. reduction on the invoice of those returned to pay for putting them in merchantable shape again. * * * We give our fireworks to nobody with the privilege of returning except on terms herein, and have but few accounts of that nature." August Koch testifies that his firm purchased goods under the terms of the letter in 1884 and in 1885, but not exactly on the same terms in 1886. He says: "The point of difference was that we were not expected to return the goods as we had been in the habit of doing, but were to keep them stored until further orders. Our agreement had no particular reference to this letter; don't know that it was thought of. It was simply a continuation of the arrangement we had with this difference: being in previous years compelled to return the goods after the fourth of July, in this year we were not compelled to do that, if we chose to keep them here. * * * We did not keep any separate account of the goods sold by us, but then we knew what goods of theirs were sold right along. * * * Hadfield & Bidwell were credited on our books with the goods we got of them. * * * We sold some fireworks on credit and they were charged in the usual way we charged other goods. * * * We used the money in connection with our own business. We could sell the goods at any price we saw fit above or below the invoice price."

It appears that the goods were billed to Koch Brothers at ten per cent. less than wholesale value; that Koch Brothers paid all freight.

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Now, it is shown by the deposition of plaintiff in error, Hadfield, that the arrangement to furnish goods to Koch Brothers in 1883 was made through John B. Kennedy, Jr., "to act as agents of Hadfield & Bidwell and sell for our account such consignment of fireworks as they might order from time to time with settlement July 10, 1886, for all goods sold at that time with privilege of returning remainder unsold to Hadfield & Bidwell, or holding them subject to our order." The contract was made according to explicit instructions, "given to him to that effect." The testimony of Kennedy as to the contract as regards returning the goods was that they "were to be returned to the factory of Hadfield & Bidwell free of expense to H. & B., or held for them in Peoria, subject to their order. The agreement I made in 1886 had no reference to any former agreement."

It seems to us that there was ample testimony from which the court below could find that this was a sale of the goods with the privilege to pay for them as to the unsold portion in the goods themselves. Mr. Hadfield himself states that Koch Brothers had the privilege to return them, not that they were compelled to do so. The letter of 1884 expressly makes the return optional and there was ample testimony from which to find that the old arrangement as to that point remained in force, in 1886. If that be the case the title of the goods was in Koch Brothers from the time they were delivered till July 10, 1886, at a stipulated price which was named in the bills sent with the goods with an option on July 10, 1886, either to pay for the goods at that price in cash or return them.

The goods were levied on before the 10th of July and before any return. In our opinion the evidence sustains the finding of the judge that the property was sold for cash, with the right to return the unsold portion. *Warder v. Hoover*, 51 Ia., *supra*; *Robinson v. Fairbanks*, 23 Reporter, 521. In the latter case it is said, on the facts similar to the facts here: "In our judgment the contract was not a bailment or a sale on trial or approval in which there is no sale until approval is given expressly or by implication; but it more nearly resembles a contract or bargain of sale or return, which vests the

property in the goods, or so much of them as remained on hand at a fixed day in the future. This day is stated to be January 1, 1886. Until then Ruston & Company had an unquestionable right to sell the goods for cash, on credit or in satisfaction of their antecedent debts, and even after such date, the goods unsold and on hand were theirs, with an option to return them to plaintiffs, which is nothing more nor less than a mere privilege to rescind the sale."

Benjamin, in his work on Sales, Sec. 598, commenting on *Ex parte White*, says: "But if the consignee is at liberty to sell at any price he likes, and receive payment at any price he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price and a fixed time, in my opinion, whatever the parties may think, the relation is not that of principal and agent, and in point of law the alleged agent in such a case is making on his own account a purchase from his alleged principal, and is again reselling."

These remarks are particularly apposite to the facts in the case at bar. Koch Brothers had full and absolute control of the sale of the goods as much as if the sale, if it be a sale, had no conditions.

They sold the goods on the market for cash or on credit the same as their other goods, kept no separate books, but used the proceeds of such sales in their general business, without any restrictions from plaintiffs in error. All that plaintiffs in error had for security for the goods sold was the individual responsibility of Koch Brothers. We can not doubt but that, in view of the law and from the evidence, the court below was fully justified in finding the issues for defendant in error. The judgment is, therefore, affirmed.

Judgment affirmed.

Wheeler v. Wheeler.

THOMAS H. WHEELER
v.
ELEANOR WHEELER, ADMINISTRATRIX.

Administration—Note—Want of Consideration—Discharge in Bankruptcy—Subsequent Promise—When Made—Instructions.

1. In an action against an estate on a promissory note, the defense being want of consideration, because given to save something out of a bankrupt estate, and discharge in bankruptcy, it is *held*: That it was improper to instruct the jury that, to entitle the plaintiff to recover against the certificate of discharge, the burden of proof was upon him to show that his claim was fair and honest and that the promise to revive the note was made after the maker's discharge in bankruptcy; that, upon the production of the note with evidence of a subsequent promise by the maker after the filing of his petition, the burden of proof to show want of consideration was upon the defendant; and that the instruction in question was misleading in regard to whom the subsequent promise was made.

2. A subsequent promise by a bankrupt to pay a note previously given by him is not required to be made after his discharge. It is sufficient to revive the note if made after the petition in bankruptcy is filed.

3. An instruction calling special attention to certain parts of the evidence is improper.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Livingston County; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. A. E. HARDING and STRAWN & PATTON, for appellant.

Mr. J. T. TERRY, for appellee.

A promise or acknowledgment to one not the creditor or his agent for that purpose, will not revive a debt barred by a discharge in bankruptcy. *Carroll v. Forsythe*, 69 Ill. 127; *Katz v. Messenger*, 7 Ill. App. 536; *Bloomfield v. Bloomfield*, 7 Ill. App. 261; *McGrew v. Forsythe*, 80 Ill. 596; *Wachter v. Albee*, 80 Ill. 47.

LACEY, P. J. This suit was based upon a note (or copy of it) given by O. B. Wheeler, deceased, in his lifetime, to appellant, for \$2,000, dated April 1, 1878. The defendant in the case is the administratrix of said decedent who died March 15, 1886, without having paid the note. Within two years from the death of O. B. Wheeler, the appellant filed his claim, based on this note, against the estate. On the trial in the County Court the claim was disallowed, and the case was appealed to the Circuit Court with like results. The appellee interposed two defenses to the recovery on the note: 1st, that the note was originally given without consideration, in that it was given in contemplation of bankruptcy, and to save something out of the estate to the bankrupt; 2d, a discharge in bankruptcy. The appellant is the son of the deceased.

The appellant, in rebuttal to the claimed discharge in bankruptcy, sets up and insists on a subsequent promise made by deceased to appellant, to pay the note made after the deceased went into bankruptcy in the United States District Court of the Northern District of Illinois, in Chicago; that the promise was made in consideration that appellant would sign a petition consenting to a dismissal of the said bankruptcy proceedings. The appellant also contends that there was ample consideration in work and labor performed by him for his father after he became of age. The discharge in bankruptcy of deceased bears date January 21, 1880, and the order of dismissal of the bankrupt proceedings was December 19, 1882. The alleged promise to pay the note was made between those dates. There was no evidence to show that this discharge was ever set aside. But A. E. Harding, attorney for appellant, filed his affidavit in behalf of appellant in support of his motion for a new trial, in which he shows that the record in the United States District Court showed that the certificate in bankruptcy had been set aside and annulled, and that on the trial he had the sole charge of procuring the testimony, and that in order to be ready for trial he sent to the clerk of said bankrupt court for a certified copy of all orders in the bankruptcy proceedings subsequent to the order adjudicating him a bankrupt, and that said clerk sent him a certified copy of the order dismissing

Wheeler v. Wheeler.

such proceedings, which affiant was advised was the final and only order in the cause subsequent to such adjudication, and affiant believed such to be the fact and did not know or learn to the contrary till on the trial of the cause, and had no knowledge of any discharge till the certificate was introduced in evidence and did not know that there had been an order setting aside such discharge until after the certificate had been offered in evidence, and then he learned for the first time of such fact, and that it had been set aside over a year before the proceedings were dismissed; that his client was wholly ignorant of all the steps that had been taken in the bankruptcy proceedings except the adjudication and final dismissal, and his proof of a claim against the bankrupt estate and the fact that he signed the consent to the dismissal, and learned on the trial for the first time, as affiant believed, of the discharge and the order setting it aside. The affiant further stated that on Monday following the trial, he called at the office of said bankruptcy court to obtain a certified copy of the order setting aside the discharge to use on the hearing of the motion for a new trial, and he was informed the clerk was sick and the party in charge too busy to attend to it, and he then made arrangements to have a certified copy of said vacation order sent to him at Pontiac, but up to the present time it had not come, and therefore prayed for a new trial on behalf of his client.

The appellant complains of the 5th, 6th and 7th instructions given on behalf of the appellee. The 5th, in substance, was to inform the jury that the discharge in bankruptcy was sufficient, *prima facie*, to discharge all the bankrupt's debts provable at the time the petition in bankruptcy was filed, and that appellant's claim was so provable. We see no error in the above instruction. It appears to announce a correct principle of law.

The 6th instruction we regard as erroneous and calculated to mislead the jury and to give undue prominence to certain evidence by calling special attention to it to the disparagement of all the other evidence, and especially the appellant's rebuttal evidence. It is as follows:

"6. You are instructed for the estate that in determining the real motive in giving of the note in question, whether to save to the deceased, Oscar B. Wheeler, something out of the bankrupt assets, or whether on the other hand he was honestly indebted to claimant, Thomas H. Wheeler, you are at liberty to consider (if proven) the amount of labor (if any) done by claimant Thomas for the deceased, Oscar B. Wheeler, in his lifetime, and after he attained the age of twenty-one years."

Such instructions have been so often condemned by this and the Supreme Court, and the law is so well settled, that it is not necessary to refer to authorities. The 7th instruction was also erroneous. It tells the jury that the discharge was *prima facie* evidence of a bar to appellant's claim, and that "to entitle him to recover against such certificate of discharge he must not only show his claim to be fair and honest under the rules of law laid down in the other instructions, but you must also believe from the evidence that after such discharge was granted, Oscar B. Wheeler promised the claimant, Thomas H. Wheeler, that he would pay the claim in question. A promise or acknowledgment to the witness Chubbuck or any other person than claimant himself, or his agent authorized to accept such promise, would not be sufficient."

In the first place the above instruction is erroneous in holding that in order to revive the debt after discharge appellant must show it to be fair and honest. That is, that appellant must take the burden of proof on himself to show that the original consideration of the note was good and valid besides showing the subsequent promise. This he was not bound to do. If he produced the note and showed by the evidence the subsequent promise, after the deceased had filed his petition in bankruptcy, that he would pay appellant the note, that was all he was required to do. The burden of proof would then be on appellee to show that the original note was without consideration the same as though there had been no bankruptcy. The discharge does not imply that there was no good consideration originally for the note. Such matter is not involved in any inquiry in the bankruptcy proceeding. The instruction was further erroneous in holding that the subsequent promise

to pay the note in order to have the effect to revive it, must have been made by the deceased after the discharge was granted. It is sufficient if the promise is made after the petition in bankruptcy is filed. *Cheny v. Bargo*, 26 Ill. App. 182.

The 7th instruction is further erroneous and misleading in that the jury would be liable to understand that the court held that the promise of deceased made in presence of appellant and Chubbuck was made to Chubbuck alone and not to the appellant, and that all the testimony given in by Chubbuck related only to a promise made to the latter by deceased to pay the note when he was not the agent to receive such a promise. It will be seen from the evidence that Chubbuck does not testify the promise was made to him. Appellant, the deceased, and Chubbuck, were together, all attending to the drawing up of the petition to have the bankruptcy proceedings dismissed. It was the conversation had in the presence of all concerning the payment of the note in suit to appellant that Chubbuck was testifying to, and not any promise made to Chubbuck. He says: "Tom said he was willing to wait for his father to pay it. O. B. Wheeler said as soon as he could get the money he would pay it." This was not a promise made to Chubbuck but to appellant in his presence. In this assumption the instruction was unfair and mischievous. The instruction may have referred to conversation held between Chubbuck and O. B. Wheeler subsequently, and out of the presence of appellant, but it does not distinguish; and besides, this evidence does not appear to refer to any promise to Chubbuck but to admissions made by O. B. Wheeler to Chubbuck. Chubbuck was not claiming that any promise was made to him, and the evidence could have no other force excepting corroboration of other promises and admissions. Pope gave similar evidence, but this could not be construed into a promise to Pope by O. B. Wheeler; whatever force the evidence had was, as said, corroborative. We find no fault with appellee's 11th instruction. There being sufficient error in the record already noted to reverse the judgment it will not be necessary to pass upon the sufficiency of the affidavits for the purpose

aimed at, read on motion for a new trial. If the order granting a discharge or the discharge itself was annulled, appellant will have an opportunity to produce it on another trial.

There was strong evidence tending to show that there was a valuable consideration originally for the note, and if it turns out that there was no discharge in bankruptcy in force, then the only issue will be on the original consideration of the note. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

WILLIAM HAWK, FOR USE, ETC.,

V.

WILLIAM T. AMENT.

28	390
171s	117
28	390
d95	*557

Attorneys—Lien on Judgment for Fees and Disbursements—Contract—Assignment of Judgment—Notice—Inquiry.

1. An attorney may, by previous agreement with his client, acquire an equitable lien on a judgment recovered or the subject-matter of the litigation and proceeds thereof, for his fees and disbursements in the case.

2. A lien so acquired takes precedence of the claim of a subsequent assignee without notice, the interest of an assignee of a chose in action being limited by the equities of his assignor.

3. It seems that, where the assignee of a judgment is put upon inquiry, he must, in making a reasonable effort to ascertain whether any claim exists against it, make inquiry of the attorney of the judgment creditor.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Livingston County; the Hon. ALFRED SAMPLE, Judge, presiding.

Mr. J. A. McKENZIE, for appellant.

The agreement between Hawk and Ament was legal, and was nothing more nor less than an agreement by parol for a conditional fee. He was to have a one-half interest for his services.

Hawk v. Ament.

An attorney has no lien upon the judgment for his services. Forsythe v. Beveridge, 52 Ill. 268; Nichols v. Pool, 89 Ill. 494; La Framboise v. Grow, 56 Ill. 202.

If Mr. Ament's arrangement was anything other than simply an agreement for a conditional fee, if it was a present sale of one-half the chose in action absolutely, and would be good as against subsequent *bona fide* purchasers without notice, then, had the railway compromised the claim and paid the agreed amount to Hawk, it would still have been responsible to Ament for his half, which was to be his for attending the litigation.

"A plaintiff may properly compromise his cause of action with the defendant and the defendant will not be bound to inquire whether the plaintiff has paid his attorney." La Framboise v. Grow, 56 Ill. 202.

It is the duty of persons to give notice of any secret liens. Nichols v. Pool, 89 Ill. 495.

Mr. A. E. HARDING, for appellee.

To constitute a valid assignment in equity, of a debt or other chose in action, no particular form of words is necessary. Any words are sufficient that show the intention of transferring the chose in action to the assignee for a valuable consideration. Thompson v. Spies, 13 Sim. 469; Chown v. Baylis, 31 Beav. 351; Row v. Dawson, 1 Ves. 831; Pass v. McCrea, 36 Miss. 143; Kimball v. Donald, 20 Mo. 577; Garnsey v. Gardner, 49 Me. 167; Lannon v. Smith, 7 Gray, 150; Jones v. Witter, 13 Mass. 304; Grover v. Grover, 24 Pick. 261.

An assignment of a part of a claim is good in equity. Exchange Bank v. McLoon, 73 Maine, 498; Daniels v. Meinhard, 53 Geo. 359; Risley v. Phoenix Bank, 83 N. Y. 318.

Assignments of choses in action, possibilities, expectancies and things not *in esse*, will be protected and enforced in equity. The assignee is regarded as the true owner of the chose in action. Thalheimer v. Brinkerhoff, 20 Johns. 380; Wright v. Wright, 1 Ves. 411; Mandeville v. Welch, 5 Wheat. 283; Bacon v. Benham, 33 N. J. Eq. 614; Trull v. Eastman, 3 Met. 121; Kountz v. Kirkpatrick, 72 Pa. St. 376.

It is claimed, however, that appellant is protected, because he bought the judgment without notice of any previous transfer, and is therefore a *bona fide* purchaser. The rule as to notice established by authority applies to the debtor only.

If he pay a claim to the assignor without notice of the assignment, he will be protected. Hence the assignee must notify him if he desires any benefit from such assignment. *Campbell v. Day*, 16 Vt. 358; *Loomis v. Loomis*, 26 Vt. 201; *Noble v. Thompson Oil Co.*, 79 Pa. St. 354; *Heemans v. Ellsworth*, 64 N. Y. 159; *Dodd v. Brott*, 1 Minn. 270.

Or if he would protect himself from the effect of a garnishment against his assignors. *Carr v. Waugh*, 28 Ill. 418; *Hodson v. McConnel*, 12 Ill. 170; *Morris et al. v. Cheney*, 51 Ill. 451.

This rule as to notice does not apply as between two different assignees of the same chose in action. The rule at law as well as in equity, in a conflict of equitable claims, is *qui prior est tempore, potior est jure*. *Muir v. Schenck & Robinson*, 3 Hill. 228.

This doctrine is fully sustained by the cases of *Bush v. Lathrop*, 22 N. Y. 535; *Shaffer v. Reilly*, 50 N. Y. 61; *Davis v. Austin*, 1 Ves. Jr. Ch. 247.

LACEY, P. J. Wm. Hawk recovered a judgment in the Livingston County Circuit Court against the Wabash, St. Louis and Pacific Railway Company, from which the defendant prosecuted an appeal to the Appellate Court, where the judgment was affirmed. From the Appellate Court the railroad company prosecuted its further appeal to the Supreme Court. While the cause was pending in the last named court and undetermined, the plaintiff, Hawk, sold and assigned in writing the said judgment to James O'Conner for a consideration of \$275. The date of this assignment was May 16, 1887, and the said judgment of the Appellate Court was affirmed by the Supreme Court on the 17th of the following June. It appears from the record that the appellant, O'Conner, had no actual notice of any interest of the appellee, Ament, in said judgment.

Hawk v. Ament.

The appellee's claim originated in the following manner: The said Hawk had a cause of action against the said railroad company for damages accruing for personal injuries he had received while acting as an employe of the company, and being desirous of prosecuting the case for the recovery of his damages he entered into a contract with the appellee, Ament, who was an attorney at law, to give him one-half of whatever judgment might be recovered in consideration that the latter would prosecute the case to final judgment. The appellee fulfilled his part of the contract and recovered judgment in the Livingston County Circuit Court for the sum of \$1,900 and costs of suit, at its January term, 1884, with the result of the different appeals and decisions as above mentioned. In addition to this half interest appellee, after the case was appealed to the Supreme Court, was promised by Hawk to be reimbursed out of the judgment for all money appellee should advance in said court. About January, 1888, the railroad company paid the amount of the judgment and interest, amounting to \$2,349.66, to the clerk of the Circuit Court.

At the January term, 1888, of the said court, appellant made his motion asking the court to direct the payment of the amount of the said judgment now in the hands of the clerk to him or his attorney, and the appellee made his cross-motion for an order on the clerk to pay over to him the sum of \$1,417.25, as belonging to him. The court sustained the cross-motion of appellee in part and ordered the clerk to pay over to him the sum of \$1,174.83, or one-half of the judgment collected, and the balance to the appellant. From this order this appeal is taken by James O'Conner. The assignment to O'Conner was recorded in the miscellaneous records of the circuit clerk's office of the county. There are two questions presented here for our consideration: 1. Assuming that appellant was an innocent purchaser of the judgment without notice, are his equities superior to those of the appellee? 2. Under the circumstances surrounding the assignment, should appellant be held to notice of appellee's claim? In the first place we think there can be little doubt that an attorney may, by agreement with the client, acquire an equitable lien

as against him in the judgment recovered, or the subject-matter of the litigation and proceeds thereof for his fees and disbursements in the case. This doctrine was fully recognized in *Smith v. Young et al.*, 62 Ill. 210. See also *Patton v. Wilson*, 34 Pa. St. 299. And in the latter case it is expressly held that the attorney, in respect to his fee so contracted, will be protected against an attaching creditor of the judgment creditor even when attached without notice. The statute also recognizes an attorney's lien for his fees in cases where mutual judgments are attempted to be set off on mutual executions in the hands of the sheriff. See Exception 5 to Secs. 58 and 60, Chap. 77, R. S. The agreement between appellee and Hawk that the former should have one-half of the judgment to be recovered amounted to an equitable assignment. *Patton v. Wilson, supra*.

The question now remains, is the lien of appellee on the judgment created by contract defeated by the subsequent assignment of the judgment to appellant by Hawk, without notice to the appellant of the lien of the appellee, if such was the case.

The question presented here has never been definitely settled by any adjudication in this State. And we have examined the question with much interest and care. It has been held by our Supreme Court that at common law, "an attorney has no lien upon a judgment for his fees in the litigation resulting in its recovery." *Nichols et al. v. Pool et al.*, 89 Ill. 491; *Forsythe v. Beveridge*, 52 Ill. 268. But in the case under consideration it will be seen the lien does not arise as a matter of law out of the mere fact of the existence of the relation of client and attorney and the performance of the legal services, but arises out of an express contract and equitable assignment. Nor is the decision in the case of *Nichols v. Pool, supra*, in any way at variance with the doctrine that a lien like this may be created by contract, for in that case the case was decided against the lien claimed by the attorneys on the ground of estoppel *in pais*. We think the decided weight of authority is in favor of the doctrine that the assignee of a chose in action only takes the same equities that the assignor

Hawk v. Ament.

had, and this rule applies to third parties who acquire rights to the thing assigned, before the assignment of which the last assignee may not have notice. For some of the cases holding this doctrine we refer to *Bush v. Lathrop*, 22 N. Y. 535; *Schaffer v. Rukey*, 50 N. Y. 61; *Davis v. Austin*, 1 Ves. Jr. 247; *Carr v. Waugh*, 28 Ill. 418; *Morris v. Cheney*, 51 Ill. 451. In the last case here cited it is intimated, though not a part of the decision, that the first assignor must give notice in order to protect his rights. This is in the nature of *dictum*. We can not regard it as deciding the point and overruling the case of *Carr v. Waugh*, *supra*, where it was held in a garnishee proceeding, a debt due the garnisheed party being attached, that a prior equitable assignee of the chose should be protected.

As to the other point, we are of the opinion that the appellant ought to be held to notice of the appellee's claim on the judgment. The judgment had been upheld by the Circuit and Appellate Courts, and the presumption would be that it would also be sustained by the Supreme Court, yet the appellant purchased it for about twelve per cent. of the amount due on it. This of itself, it would seem, ought to have put him on inquiry; but in addition it appears that his suspicions were so far aroused as to cause him to exact an affidavit from the judgment creditor, that the judgment had never been assigned, and he also inquired of the clerk as to whether any assignment was of record. But he strangely failed to inquire of the plaintiff's attorney, the person of all others who would have been most likely to know all about it. If he had inquired of him he would have been informed at once of his rights in the matter.

Having been once put on inquiry, the appellant should have pursued it till he had made all reasonable effort to ascertain if any one had any claim on the judgment, and such inquiries could not reasonably stop short of making inquiry of the attorney of Hawk, the appellee. Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

JOHN ALLISON
V.
J. N. PERRY ET AL.

Partnership to Deal in Coal Lands—Dissolution—Bill for Accounting—Statute of Frauds—Evidence.

1. Upon a bill filed by a partner against his co-partners for an accounting and for other relief, it is *held*: That the contention of the complainant that the defendants had agreed that certain lands controlled by him should be taken in as part of the assets of the firm which was formed for the purpose of dealing in coal lands, is unsupported by the evidence.

2. A parol contract of partnership to deal in lands, is not within the statute of frauds.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Ogle County; the Hon. WILLIAM BROWN, Judge, presiding.

On February 26, 1885, John Allison filed in the Circuit Court of Ogle County his bill of complaint against I. N. Perry and M. D. Hathaway, setting forth, amongst other things, in substance, the purchase of what was known as the O. J. Booth lands, in partnership between said John Allison, I. N. Perry and M. D. Hathaway, in equal one-third shares; and also charging that said Perry then promised to take into the partnership what were then known as the Royal lands, at \$55 per acre, or as much thereof as said Allison might be able to perfect title to, which, the bill says, was estimated at somewhat over one hundred acres; charging, also, the making and renewing to Perry and Hathaway of his notes for a portion of his share of the purchase price of the Booth lands; that he, Allison, had taken title to the Royal lands in the name of his son, W. S. Allison; and that since February 28, 1883, he has been ready, willing and able to convey said Royal lands, and that Perry and Hathaway refuse to accept the same.

Allison v. Perry.

The bill prays an accounting between the parties; that Perry and Hathaway pay to him what may be found due him from them, or either of them; and that said notes be canceled and given up, and for general relief.

April 22, 1885, Perry and Hathaway filed their answer to said bill, admitting and averring the partnership in the purchase of the O. J. Booth land; and also averring the purchase for the partnership of about three and one-half acres of land known as the Waters land; but denying that defendants ever, at any time, promised or agreed to purchase or take into the partnership the Royal lands, so called, or any part of the same; and also stating and charging the partnership dealings between the parties, and averring the making of his notes by said John Allison for his one-third of the first and second payments on the Booth contract, and the making of new notes for the principal and interest of the notes so made upon said payments, on or about January 8 or 9, 1883; one of said notes for \$5,000, at six months, dated January 8, 1883, with interest at seven per cent, the other for \$301.31, at one day, dated January 9, 1883, with interest at seven per cent., and the non-payment thereof.

April 22, 1885, at the time of filing their answer, said Perry and Hathaway filed in said cause their cross-bill against said John Allison, therein charging the general dealings of the partnership and the property and assets by it owned, and praying for a full accounting of all partnership advances, receipts and expenses, and that the partnership might be dissolved, its property and assets sold, and the proceeds applied to the payment of liabilities and adjustment of accounts between the copartners.

On May 7, 1885, John Allison filed his answer to the cross-bill, denying that any such agreement was made on or about February 14, 1882, as set up in the cross-bill, and denying that any copartnership was made except as stated and set forth in his original bill, and denying that the Booth contract was assigned to, and deed of the land therein described taken in the name of, I. N. Perry at his request; and admitting that said notes were unpaid, for the reason alleged in his original bill.

Pursuant to notice, on August 7, 1886, John Allison filed an amendment to his answer to the cross-bill, claiming the benefit and protection of the statute of frauds and perjuries against claims set up in the cross-bill.

On December 9, 1885, Perry and Hathaway amended their answer to the original bill, claiming the benefit and protection of the statute of frauds and perjuries against the claim or alleged agreement of the copartnership to take any other lands than the O. J. Booth and Waters lands.

Replications were filed to the respective answers, and the cause, by agreement of parties, referred to the master in chancery of said Ogle county, requiring him to take proofs and state an account between the parties.

A very large mass of testimony was submitted to the master, and on January 11, 1887, he made and filed in said court his report, finding that the partnership only embraced the O. J. Booth and Waters lands, and stating an account between the parties up to December 6, 1886.

Exceptions to the master's report were filed before him by the complainant and by the respective defendants, which were overruled by the master and the exceptions renewed before the court.

Upon the hearing before the court the exceptions of the respective parties were overruled, and the master's report as made, confirmed, and the decree appealed from, entered.

Messrs. S. C. STOUGH and J. C. SEYSTER, for appellant.

Messrs. WILLIAM LATHROP and M. D. HATHAWAY, for appellees.

LACEY, P. J. The main, and perhaps the only question in this case as raised by the pleadings or controverted by the parties, is whether, at the formation of the partnership, the so-called Royal lands of Mr. Allison, or any part thereof, were to be taken in as a part of the assets of the firm, or whether any valid agreement was made to take them in or to form a partnership without taking them in. The evidence taken before

the master and preserved in the record is quite voluminous and much of it irrelevant, and we have examined it with the care which the importance of the case deserves, and have arrived at the conclusion that the appellant has failed to make out his claim. We shall not take the trouble to go over the evidence in detail, as it would consume much time and is unnecessary. The agreement which appellant Allison claims, by which his Royal lands of one hundred acres were to be taken into the firm at fifty-five dollars per acre, was entered into and consummated about February 14, 1882, and was negotiated between him and appellee Perry, the latter, as appellant claims, acting in behalf of Hathaway and himself.

We think, aside from the other evidence in the case, that appellant's own letters negative any such understanding as is claimed by him to take into the partnership the Royal lands.

In his first letter addressed to appellee Perry, dated Gardner, January 9, 1883, nearly one year after the formation of the partnership, in which letter was inclosed his renewal notes for his interest in the firm, he says: "I hope you and Mr. Hathaway will take in our Royal land, and if you will it will help me out, and I am sure it is as good coal land as any of it, and, as well as some small pieces of the Royal lands, is surrounded by the Booth land, and is clear enough and will not lessen the value of the Booth land; then if you could fix it so I could only own one-fourth or one-sixth, I could get along with it. Please consider this."

Then again, May 30, 1883, in another letter directed to appellees, he says: "Gents: I wish you would do one of two things for me—either take my Royal lands or let me out as a partner with you on the Booth land. I am not in shape to pay any part unless you take in my land, and to pay interest will only make it worse for me; if there was no coal there I should not have asked you men to do either; think of this and let me know."

This is not the language of a man who already had an existing contract with appellees to take in this land, made a year before. If such a contract existed he would have demanded its fulfillment instead of asking that the land be taken in as a matter of favor. The disclosure made by these letters entirely

harmonizes with the evidence of appellees and contradicts his own testimony. The explanation given by Allison of the writing of the letters, that he did it at the instance of Perry to induce Hathaway to take in the lands, is not satisfactory.

The fact that the title of the lands of the firm were held by appellant in his own name, does not render the partnership agreement, which was in parol, obnoxious to the statute of frauds. *Wallace v. Carpenter*, 85 Ill. 590; *Chester et al. v. Dickinson*, 54 N. Y. 1; *Yoak v. Clemens*, 41 Ia. 95. Although an optional contract for the purchase of the partnership lands was made prior to the formation of the partnership, yet the title was acquired after such formation and for the benefit of the firm. The land was paid for on account of the firm.

The objection to the improper introduction of evidence on part of appellees is not of any force. It matters not what illegal evidence is introduced on a trial in equity. The court will consider only such as is competent, and we find abundance of evidence aside from the portion objected to, to support the decree.

The master, in allowing Allison seven per cent. interest on the sums paid out by him, did not err. This was correctly found from the bill and answer. The allowance to Hathaway of \$81.38 and to Perry \$96.75 for personal expenses for attention to business of the firm is not erroneous. The allowance is justified by the evidence.

The claim is set up in appellant's reply brief that there was no partnership by the pleadings and evidence. We are satisfied that the partnership embraced the Booth and Waters lands alone.

The point made by appellant, that the decree does not provide for the collection of the notes for rent, one note for \$500 due October 1, 1885, and one for \$500 January 1, 1886, as firm assets, is not well taken. It does so provide. Rent was only reported by the master as collected to December 1, 1886. The above notes were not then collected. The decree plainly, in its findings and directions, mentions and provides for such collection for the benefit of the firm. It was not error to exclude the personal account of Perry and appellant for the accounting. The decree is therefore affirmed.

Decree affirmed.

Nat. Bank of Pontiac v. Langan.

NATIONAL BANK OF PONTIAC

V.

JAMES LANGAN.

Bailments—Public Warehousemen—Deposit of Corn—Levy—Trover.

1. Upon a deposit of grain in a public warehouse in this State, to be mixed with the grain of other persons, the depositor becomes owner of an equal quantity of grain of the same kind and quality as that deposited, the transaction being a bailment and not a sale.

2. Grain so deposited is not subject to levy under execution against the warehouseman, and the owner may maintain an action for the conversion thereof when it has been sold under such execution.

3. One who is engaged in storing grain for a compensation in an elevator and its appurtenances, is a public warehouseman under the laws of this State.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Livingston County; the Hon. N. J. PILLSBURY, Judge, presiding.

Messrs. STRAWN & PATTON, for appellant.

It is a general rule that where it is understood between the contracting parties that the goods delivered are to be mixed with like goods of the party receiving the goods, the transaction is held to be a sale and not a bailment. *Carlisle v. Wallace*, 12 Ind. 252; *Smith v. Clark*, 21 Wend. 83.

And the same is held of a deposit of grain with a warehouseman, with the understanding that, when the depositor desires to sell, the warehouseman is to pay him the highest price, or return a like quantity and quality. *Johnson v. Browne*, 37 Iowa, 200; *Rahilly v. Wilson*, 3 Dill. (C. C.) 420; *Chase v. Washburne*, 1 Ohio St. 244; *Butterfield v. Lathrop*, 21 Pa. St. 225.

See also to the same effect the following cases: *Reed v. Abbey*, 2 N. Y. Sup. Ct. 380; *Bates v. Coster*, 3 N. Y. Sup. Ct. 580; *S. C.*, 1 Hun, 400; *Jenkins v. Eichelberger*, 4 Watts,

121; Pritchett v. Cook, 62 Pa. St. 193; Herrick v. Carter, 56 Barb. 41.

Where the identical thing delivered is to be restored, although in altered form, the contract is one of bailment and the title to the property is not changed; but where there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return and the title of the property is changed; it is a sale. *Mallory v. Willis*, 4 N. Y. 76; *Moore v. Holland*, 39 Me. 307.

It is held that trover does not lie for property the plaintiff has purposely so intermingled with other similar property of the defendant that it can not be distinguished or separated from the common mass; but in such cases the whole mass becomes the property of the person with whose goods it was so intermingled.

In several cases in Illinois the foregoing doctrines are applied to cases of grain delivered in warehouses under contracts and circumstances similar to the case at bar. *Lonergan v. Stewart*, 55 Ill. 44; *Richardson v. Olmstead*, 74 Ill. 213; *Bailey v. Bensley*, 87 Ill. 556.

As to the common law rule in grain transactions involving the facts and circumstances of the case at bar, in the country at large, there are two currents of authority.

Where the grain is stored in an elevator with the understanding between the parties that it is to be mingled with other grain, and it is not contemplated that the keeper of the elevator shall return the identical grain stored, but only that he shall return an equal amount of grain of the same kind and grade, substantially as in the case at bar, the following cases hold that the transaction is a sale: *South Australian Ins. Co. v. Randall*, L. R. 3 C. C. 101; *Chase v. Washburne*, 1 Ohio St. 244; *Lonergan v. Stewart*, 55 Ill. 44; *Richardson et al. v. Olmstead*, 74 Ill. 213; *Bailey v. Bensley*, 87 Ill. 556; *Johnson v. Beaver*, 37 Iowa, 200; *Nelson v. Brown*, 44 Iowa, 445; *Carlisle v. Wallace*, 12 Ind. 252; *Rahilly v. Wilson*, 3 Dill. (W. S. C. C.) 420.

The following cases, on the contrary, held the transaction to amount to a bailment: *Sexton v. Graham*, 53 Iowa, 181; *Ne-*

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son v. Brown, 53 Iowa, 555; Ledyard v. Hibbard, 48 Mich. 421; Andrews v. Richmond, 34 Hun, 20; 6 Am. Law Rev. 450.

Kent conducted his warehouse precisely as did Stewart and Richardson & Co., prior to the statute, and precisely as have all country warehouses or elevators been conducted both before and since the statute, and there is no reason why a rule which is purely statutory in Illinois should be forced upon these parties who did not deal under the statute or in contemplation of it.

Messrs. McILDEFF & TORRANCE, for appellee.

UPTON, J. Lester E. Kent, in the fall and winter of 1882 and the spring following, was engaged in business as a grain dealer and warehouseman, and as such bought, stored and shipped grain, among other places, at Nevada, in Livingston County, where he had a grain elevator, warehouse and two corn cribs.

His principal business was the purchase and sale of grain on his own account, but when offered at his elevator or storehouse he received grain, including corn in the ear, *in store for a compensation*.

Attached to or near said grain elevator and warehouse were the two cribs, at and in which was received and stored for compensation, corn in the ear. The grain in the elevator or warehouse and the corn in these cribs purchased by Kent, and that which was received by him in store for a compensation, were not kept separate, but were put as unloaded into common bins or cribs, from which he would shell and ship to market as he might desire, supplying the amount of stored grain shipped, by receipts purchased on in store from other parties.

At various times during the winter of 1882, and the spring of 1883, there was delivered at such elevator and warehouse belonging to appellee eleven hundred and forty-two bushels and twenty-five pounds of corn in the ear, after the delivery of which, Kent, by his agent, gave to appellee a receipt, of which the following is a copy:

“ NEVADA, ILL., Feb. 8, 1883.

“Received of James Langan, eleven hundred and forty-two bushels and twenty-five pounds of ear corn in my elevator. Rec. it as rejected, and I agree to pay him any time for any portion said Langan wishes to sell of it, highest price I am paying for such grade, and I also agree to keep it in my elevator for him ninety days free of storage; after that I will charge half a cent per bushel per month for storage.

“ L. E. KENT,
“ Per Riley.”

The corn mentioned in this receipt had, before the execution and delivery thereof, in fact been shelled, shipped and sold by Kent, and other corn purchased and put in place thereof.

On the 12th day of May, 1883, the National Bank of Pontiac caused an execution to be issued upon a judgment rendered in the Circuit Court of Livingston county, in its favor, against Kent, for about the sum of \$4,785, and placed the same in the sheriff's hands the same day to execute.

On the 14th day of May, Langan, hearing that Kent had failed to put a notice in writing on said corn crib (then containing 500 or 600 bushels of corn in the ear), posted a notice that he claimed the corn therein, and on the same day, Morrow, the president of the bank, and acting for it, also posted a notice on said crib that the bank claimed the corn, and he at the same time placed one Riley in charge thereof, as custodian for the bank.

We think Langan posted his notice first in point of time, although the evidence upon that point is not so full as might be desired, but we do not consider this material in the view we take of the case.

On the 16th of May the sheriff, by virtue of that execution, actually levied on the corn in the crib, and in due course sold it at sheriff's sale. The bank purchased it, and applied the proceeds in part satisfaction of its judgment against Kent, claiming the corn as belonging to Kent.

Appellee made demand of Kent, Morrow and the bank for the corn, while in possession of the sheriff under the execution and levy thereon.

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Upon being refused the property he brought suit in trover in the Circuit Court of Livingston county, against Kent and Morrow and the bank jointly, for its conversion, and upon hearing in the Circuit Court obtained a judgment against all said parties defendant, which upon appeal to this court was reversed and remanded to the Circuit Court for want of evidence of a joint conversion by all the defendants. *National Bank of Pontiac v. Langan*, 16 Ill. App. 505.

Upon which remand appellee, in the court below, dismissed the suit as to Morrow and Kent, and upon leave of court the pleadings were amended to conform to such change of parties, issues were joined, jury waived and cause submitted to the court for trial, which, after hearing the evidence, gave judgment against the appellant in the sum of \$215 and costs, to reverse which the cause is again before this court on appeal and errors are assigned upon the record.

In the exhaustive argument of the learned counsel for appellant our attention is called, first, to what is termed an assumption of the court below, "that Kent was in the business of receiving grain under the warehouse law," and it becomes important to determine under the evidence in the case whether Kent was or was not in law or fact, in the receipt of the corn in question, engaged in business under the warehouse act.

Article XIII, title, "Warehouses,"¹ of the Constitution of 1871, Sec. 1, declares that, "All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses."

This record discloses the fact, uncontradicted and undisputed, that Kent controlled, managed and occupied this elevator or storehouse, with corn cribs attached and adjacent thereto, at the place and time in question, and stored therein, for a compensation charged for such storage, corn on the cob belonging to the appellee. The receipt offered and in evidence shows that fact. Kent swears to it positively, and no word or circumstance in evidence in the case, as shown by the record, contradicts it.

We are not aware whether the receipt in question is in the form adopted and put out by those acting and conducting their business under the warehouse law, nor do we deem that material to this inquiry; but the substance of the transaction rendered by the receipt is, to our minds, that Kent was at that time doing business in an elevator and its appurtenances where grain or other property was stored for a compensation, and, as such, was under the organic law of the State a public warehouseman, as to the corn in question in this suit, and doing business as such.

The question now presented is, to whom did the corn in question, so stored in such public warehouse, belong? In other words, who was the owner thereof at the time of such levy of appellant's execution thereon?

We answer, with this record before us, that it was either the property of the appellee, Langan, or that of Lester E. Kent. If the latter, it was liable to appellant's execution and the judgment below should be reversed. If to the former, that judgment should and must be affirmed.

It is contended on the part of appellant, that, where grain is stored in an elevator or warehouse with the understanding, knowledge or consent between the parties concerned therewith that it is to be commingled with other grain of like kind and quality, and it is not contemplated that the keeper of the elevator, or warehouseman, shall return the identical grain stored, but that he shall only return an equal amount of grain of the same kind and grade substantially, as in the case at bar, such transaction constitutes a sale of the grain so stored to such warehouseman. To sustain that view we are cited to the following cases in this State: *Lonergan v. Stewart*, 55 Ill. 44; *Richardson v. Olmstead*, 74 Ill. 213; *Bailey v. Bensley*, 87 Ill. 556.

It will be noticed that the first two cases cited above, viz., the 55th and 74th Ill., were determined without reference to the organic act above referred to, and the legislative enactment of 1871 entitled "Warehouses," and the subject-matter in controversy in those cases arose and was decided before the adoption of the Constitution of 1870, or the enactment of

the General Assembly in furtherance thereof, and as a consequence could not be regarded as authority, in view of such provisions or enactments or in contradiction thereof.

The case of *Bailey v. Bensley*, *supra*, was determined, and the subject-matter thereof arose or accrued, in 1873, but, in our judgment, is not in point for the appellant.

In the subsequent case of *German National Bank v. Meadowcraft*, 95 Ill. 130, the Supreme Court say: "In that case (*Bailey v. Bensley*) the questions involved were between the commission merchants and their consignor. He had shipped grain to them to be sold when he should so order. When they sued him for a balance for advances, commissions and charges paid for storage, one of the objections raised by him was that, on receiving receipts for grain he had consigned to them with directions to hold it, they had sold and transferred the warehouse receipts given when his grain went into store, and that when he ordered them to make sales they furnished and sold other receipts representing the same quantity and grade of grain as he had stored, and for which the receipts had been given. But it was held that this, being according to usage on the Board of Trade, was unobjectionable."

"Here, the court was not discussing what legal right the holder of the receipt for the grain has, but what claim the consignor has on his consignee, to whom the receipt was given, and which had never been delivered to the consignor, so as to vest title in him of any specific property or any number of bushels of the entire mass with which it was mingled. Had the consignee returned the receipt to the warehouseman and demanded a delivery of the grain, the latter could not have been heard to say the consignee was not the owner of that number of bushels of grain to be taken and separated from the great bulk of grain of the same grade. He would not have been entitled to the very same grain he stored or placed in the warehouse, but to other similar grain. So it would have been had the consignee given the receipt to the consignor, and he had made the tender and demanded the grain for which the receipts called." This case does not impinge the rule that, when the owner of grain consents that

his shall be commingled with that of another, he can not recover for its conversion.

By judicial determination, therefore, the case of *Bailey v. Bensley* can have no application in appellant's favor in the case at bar, nor in support of his theory. On the other hand, as subsequently construed, as we have shown, it is an authority that when grain was commingled, as in the case at bar, as between the warehouseman and the owner of the grain so stored, it was but a bailment and not a sale.

It is evident that in the cases cited by appellant as sustaining his theory of a bailment the test was solely one of identity under the common law rule, which was, that when the owner parts with the means of identifying his property or controlling it, the person to whom it is delivered instead of being a bailee, becomes a debtor. It was upon that principle and in consonance with that rule that the cases cited by appellant were determined. In the case at bar, the organic law and the statute in furtherance of its provisions have removed that test and declared, in effect, that such a mixture by consent in a public warehouse in this State shall not deprive the owner of the grain of his *legal title* thereto, or what is the same thing, to a like quantity of the same in kind and quality stored.

But the precise question we regard as settled in this State in the cases of *Meadowcraft v. German National Bank*, 95 Ill. 124, and *Canadian Bank v. McCrea*, 106 Ill. 281. It is admitted by appellant to have been expressly determined under the act of 1871, passed to give effect to article 13 of the Constitution, *supra*, that, in a deposit of grain in a public warehouse in this State to be mixed with the grain of other persons under the warehouse act, such depositor becomes the owner of an equal quantity of grain of the same kind and quality as that deposited, and that the title to such deposited grain does not pass to the warehouseman; that, in short, it is a bailment only and not a sale.

Those cases are the latest adjudication of the court of last resort in this State upon that subject, and we are not at liberty to disregard them. They further hold that, after demand made and on refusal to surrender the same, and the payment

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or offer to pay charges for storage thereof, an action may be maintained for the conversion thereof, by such consignee, as the owner.

This settles the question of the ownership of the corn in controversy, as between the warehouseman, Kent, and the appellee, Langan, in favor of appellee. As between them it was Langan's corn, and as such the appellant had no authority to levy upon or sell the same, and must, having done so, respond in damages for the value of the corn. Schlinder et al. v. Westown et al., 9 Ind. 395; Sexton v. Graham, 53 Iowa, 181; Rice v. Dixon, 97 Ind. 97; Rotherburg v. Dixon, 97 Ind. 106; Young v. Miles, 23 Wis. 643; Cushing v. Breed, 14 Allen, 376; Broadwell v. Howard, 77 Ill. 305.

In the case last cited the court says: "The fact that he keeps a public warehouse is of itself notice to the world that the property there stored is held for others; at least, sufficient to put parties interested on inquiry as to such right." We have carefully examined the record in this case and the errors assigned thereon, and are of the opinion that in rendering judgment for appellee in the court below no error was committed, and that judgment is affirmed.

Judgment affirmed.

MARY HOPKINSON

V.

J. BLACKBURN JONES.

28	409
97	4483

Attorney and Client—Fees—Account Stated—Continuance—Evidence—Instructions.

1. The admission by a party against whom an affidavit for a continuance is made, that the absent witness will swear to the material facts therein stated, will not warrant the court in overruling the motion for a continuance, when it appears that the presence of the witness is necessary to a fair trial.

2. Where an answer of a witness is but a mere conclusion and is not responsive to the question, it should be stricken out.

3. Business transactions between an attorney and client may be investigated in a controversy between them, and the burden of proof is upon the former to show the justice of his demands.

4. A statement of account between attorney and client is not conclusive upon the client.

5. Upon a suit brought by an attorney for the recovery of fees, instructions which, ignoring the relation of attorney and client, inform the jury that an account stated is final, are erroneous.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

Messrs. BOTSFORD & WAYNE, for appellant.

Messrs. D. B. SHERWOOD and OSCAR JONES, for appellee.

C. B. SMITH, J. This was an action in assumpsit brought by J. Blackburn Jones, appellee, against Mary Hopkinson, appellant, in the Kane county Circuit Court, to the October term, 1886, and was tried at the October term, 1887.

The declaration contains three counts. The first one declares for services rendered as an attorney; the second on an account stated between the parties for \$3,038.59, and alleges further that, in consideration of the speedy payment, plaintiff would accept \$2,888.59 in full settlement, provided said last sum was paid in sixty days from November 17, 1885, and that defendant neglected so to pay, and plaintiff therefore claims the full amount of \$3,038.59 with interest from November 17, 1885. The third count seems to be the consolidated common counts. No evidence was offered under either the first or third counts. The trial was had under the second count.

The defendant pleaded the general issue and a plea of set-off. Appellee is a lawyer living and practicing law in the city of Chicago. Appellant is the widow of Charles Hopkinson and lives in Kane county, Illinois. Charles Hopkinson in his lifetime had been one of the bondsmen of Postmaster McArthur, of the city of Chicago, who, after McArthur's default, was sued on his bond with the other sureties.

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This suit was pending, but untried, at the time of Hopkinson's death, and the suit was abated as to him. Appellee had been of counsel for Hopkinson in his lifetime. Mr. and Mrs. Hopkinson had no children of their own, but they had adopted and raised a little girl named Lilly, up to womanhood, and she had taken their name. This girl grew to be a young woman and after Mr. Hopkinson's death, this adopted daughter was the constant companion of appellant, and did all her writing, and was with her in all her business transactions, and advised with her and was, indeed, her adopted mother's secretary, and was fully cognizant of all her mother's affairs. She was afterward married to a Mr. Johnson.

Just before the trial was called, appellant entered a motion for a continuance on account of the absence of this daughter, Lilly, who was sick and unable to be in court, and in support of said motion read the following affidavit made by appellant:

"That affiant can not safely proceed to the trial of said cause at the present time, on account of the absence of one Lilly Johnson, a resident of Chicago, Illinois, who is a material witness for the defense. That said witness is the adopted daughter of affiant, and was raised in her family and remained a member thereof until her marriage, about one year since; and she is the same person who is mentioned in the accompanying affidavit of Dr. Armstrong. That said witness, on August 31st, gave birth to a child, and for a time was seriously ill, but her gradual improvement has recently been checked by a relapse, which makes her appearance in court at the present time impossible. That said witness during the transactions in controversy in this case, was residing with affiant, was present at their occurrence and advising with affiant and participating in them, and is familiar therewith. That affiant has a good and meritorious defense to this action. That she expects and believes that she can prove by said witness that the sum of \$5,000 mentioned in plaintiff's bill of particulars 'as fees agreed upon,' is erroneous, and that the services of plaintiff were not definitely agreed upon, but when rendered, to be paid for, for what they were reasonably worth. That, in the presence of said witness, plaintiff agreed to render said

services upon a fair and reasonable consideration. That by said witness she will be able to prove the kind and nature of said services, so that other witnesses may be competent to speak of their value, and that by such proof she will be able to show that said services rendered by the plaintiff were not worth the one-half of \$5,000. That said plaintiff on the trial will attempt to establish an express contract, and that on that point there will be a conflict of testimony, and an attempt on the part of plaintiff to sustain an agreement to pay the amount shown in said bill of particulars. That said witness was present on an occasion referred to in some depositions taken by plaintiff when there was an attempt to make a settlement of the account between plaintiff and affiant, and that after some preliminary talk was had about said account, there suspiciously appeared in plaintiff's office, persons who appeared to have dropped in as witnesses to this conversation, when affiant forbore to make in their presence any further conversation about her affairs. It is now claimed by two of these persons that certain admissions were made by affiant which were entered in a certain book which is to be produced as evidence thereof in this case. Affiant expects and believes she can prove by said witness that no such statements, admissions or conversations were had or made by affiant so recorded in said book, either in words or substance, nor was any such book present or written in when affiant was present.

"But affiant expects and believes she can, on the contrary, prove by said witness that on that occasion this affiant informed plaintiff that his said bill was exorbitant; that she did not owe the amount claimed; that such account was incorrect, and that proper credits had not been allowed her; that affiant never consented to or agreed to any balance thus shown. That she expects and believes she can and will show by said witness that on said occasion, when no persons were present except plaintiff, defendant and said witness, this account was examined, and that affiant claimed credit for the sum of \$500, which does not appear in said bill of particulars, and that plaintiff then agreed that she should, on said account, have credit for that sum.

“Affiant further states that plaintiff once had in his hands, gas stock of this affiant of the face value of \$500, which he disposed of without her knowledge or consent, and that he then also offered to allow the value of same to affiant. Affiant further expects and believes she can further prove by said witness that on another occasion, at plaintiff's office, when witness was present, and after the rendering of a bill to her showing due to him about \$3,000, and after all services claimed for had been rendered, then allowed and admitted credits to affiant so as to reduce said account to \$2,000. Affiant further states that by way of compromise and to avoid threatened litigation she consented to pay said \$2,000 and borrowed a sum of money to pay it, but plaintiff would not accept it, and refused to allow said credits, and that this was the only agreement or compromise made by affiant when said witness was present.

“Affiant further says that should plaintiff be a witness in his own behalf on the trial, affiant is advised that it will be important for her to have said witness in court, in matters of rebuttal to the testimony of plaintiff, as she was present at all the agreements and material transactions between plaintiff and defendant, and that the presence of said witness in court is material and necessary to her defense on said trial.

“That on most, if not all of said facts, there will be a contrariety of evidence, and affiant knows of no other witness, except herself, by whom she can prove said facts, so within the knowledge of said witness or of any of them. That said witness is not absent by the consent of affiant, but if the case be continued for the term she believes she can secure her attendance at the next term of this court, and that this continuance is not for delay.”

Affidavit of John B. Armstrong, states on oath, that he is a practicing physician of the city of Chicago, and the family physician of Mrs. Johnson; that on the 31st day of August last, she, after serious labor, gave birth to a child; that for a month she was confined to her bed; that she is now suffering from threatened abscess of the breast, rendering her absolutely unfit to attend court, or to be subjected to any physical or

mental excitement for six weeks to come; that he attended her through her confinement, and that she is now under his treatment.

The court held these affidavits sufficient to entitle the defendant to a continuance, and thereupon plaintiff elected to admit the affidavit, and the court then overruled the motion for continuance and required the defendant to go to trial, against her objection, to which ruling of the court she excepted. A trial was then had resulting in a verdict for the plaintiff for \$3,216.86.

The court overruled a motion by defendant for a new trial and rendered judgment on the verdict for the plaintiff. The defendant prayed an appeal and brings the record here for review, and assigns numerous errors committed against her on the trial.

The first error complained of is the action of the court in overruling her motion for a continuance after appellee had elected to admit the affidavit. We think this objection is well made. The affidavit which we have set out in full not only shows that Mrs. Johnson was a very important witness, but it goes further and shows that her presence at the trial was as important to a fair and just trial as was her mere testimony.

The affidavit stated her familiarity and intimate knowledge with all the business transactions and conversations had between her mother and appellee, out of which this controversy arose, and that she carried on the correspondence between them, and was present at the various times when plaintiff claimed that the defendant had admitted and promised to pay his claim. There can be no doubt that the presence of this witness to aid in giving her mother advice and assistance on the trial, and to meet with her testimony any new and unexpected phase of the case, was important to a fair trial.

The subsequent course and conduct of the trial fully justified the affidavit and demonstrated the necessity of Mrs. Johnson's presence. The admission by a party against whom an affidavit for a continuance is made, that the absent witness will swear to the material facts stated in the affidavit will not always warrant the court in overruling the motion for a continuance.

It sometimes occurs that the relations of the absent witness to the party desiring his evidence and attendance is such that his personal presence is as important to aid in the conduct of the trial as his evidence upon the issue involved. And when such personal presence of the witness is fairly shown to the court by proper affidavit to be reasonably and probably necessary to a fair trial and to prevent surprises, then, and in such cases the motion ought not to be overruled because the party may admit the affidavit.

The case before us we think fairly illustrates the necessity and propriety of such rule. The facts to justify such a departure from the usual course, must rest in the sound legal discretion of the court, subject to review, however, for abuse of discretion.

It appears from the evidence that the claim of appellee is not for any services rendered appellant's husband during his lifetime, but was wholly for services rendered appellant in the settlement of her husband's estate. She testifies that prior to her husband's death she knew but little of appellee, and had not much acquaintance with him, and that after her husband's death she received a telegram from appellee, and that in response she went to Chicago to see him, and that he was anxious to do her business, and that she gave it to him. This seems to have been the beginning of the relation of client and attorney between the parties, and it was begun at the solicitation of appellee. The evidence in this record discloses the fact that Mrs. Hopkinson was a woman little acquainted with business affairs and methods, and was largely dependent upon her attorney and her adopted daughter for advice and direction in her business affairs. The relationship of client and attorney covered a period of something near three years and was terminated in 1886, if not before, by the commencement of this suit.

During the progress of this employment and before the estate was settled up the plaintiff presented defendant with a bill for services amounting to something over \$3,000 and the defendant offered to prove that he first proposed a lump charge of \$5,000 which he, in fact, had in his account, but the

court refused to allow the proof. The testimony in the case does not disclose what services the plaintiff rendered the defendant for which he demanded this large sum of money. The plaintiff rested his case on proof of an account stated without attempting to show what services he had rendered, nor what such services were worth.

The plaintiff claims that the settlement was made between himself and defendant, and the account stated at his office in Chicago on the 17th day of November, 1885, and that the amount then agreed upon as due plaintiff was \$3,038.59.

The plaintiff swears she promised to pay this amount, a part at a time. He had rendered her the bill in 1884, which she had kept ten months without paying any attention to it. Shortly before this alleged settlement was made plaintiff swears that he wrote her that he wanted a settlement; it was about time to close the estate in the County Court; that she had given notice to settle the estate on the 19th day of November, and that, unless the account was settled, he would do nothing further in the estate, in her business.

In response to this letter he swears that she and Lilly came to his office November 17th, and said she had come to settle the account. It appears that plaintiff's office forms a sort of central room and doors lead from it into some two or three other offices occupied by other attorneys who had intimate personal and business relations with plaintiff. They each had a private office opening into this common or central room. Henry T. Steele occupied one room. Robert McCurdy another. Henry M. Price occupied another of these rooms, all opening into plaintiff's office.

After defendant and her daughter, Lilly, had been in the office a short time talking about the settlement on the 17th day of November, and after they had discussed different items of the account plaintiff himself says: "I am going to have a witness here and will speak to Steele, and have him come in, so he may know what is said and done. Lilly said she spoke to McCurdy to come in. I then told Steele we had some difficulty, but had struck a balance of \$3,038.59. She says she will be satisfied if I will allow her \$150. I agreed to that and

the amount will be that much less. She then said, 'What will you do if I can raise \$2,000 right away?' I said, 'If you will raise it by January 1st, I will receipt the bill with pleasure.' I then wrote what appears in the bill to that effect. She said she was satisfied with the bill, and after that our business relations continued, and she consulted me on business matters of her own."

Henry T. Steele testified for plaintiff, that the plaintiff called him for a witness and that he was requested to take notice of what was said and done; that he was shown some figures that appear at the bottom of an exhibit, and that while plaintiff was admitting the \$3,038.59, she was also insisting there must be a deduction of \$150. "No balance mentioned or struck." "I took the amount in price and date and put it down in diary or journal." "I don't remember that defendant made any reply."

On cross-examination this witness swears he was formerly a partner of appellee's, and that appellee has most of his chancery cases referred to him; that he can't call to mind the conversation between the parties at the time. Only put down "Mrs. Hopkinson, in General Jones' office, says, owes \$3,038.69, less \$150, and if paid before January 1st, \$2,000 to be accepted."

"Probably defendant did not say what I have written; can not give her words. It was written in my office. I wrote it after I left plaintiff's office."

Robert McCurdy testifies that on November 17, 1885, he and plaintiff both had private offices opening in the same general room, and that he was present at what purported to be a settlement between plaintiff and defendant. Plaintiff said there had been some dispute about the account, but he had now agreed on the amount due.

The amount was then stated by the plaintiff a little over \$3,000. Defendant claimed a credit of \$150 and plaintiff said he was willing to allow it. Can't state substance of anything the defendant said. Plaintiff said if \$2,000 was paid by the holidays, then he was to accept that amount. Defendant made no answer to that proposition.

On cross-examination this witness says, at one time he had desk room in plaintiff's office, and had more or less interest in his business matters. At the time of this meeting Steele was in plaintiff's office, and plaintiff said he wanted us to be witnesses to the conversation that took place. The account had been agreed upon when I came in. I do not remember any particular words the defendant said; can't state anything she said in words. McCurdy further swears that Steele made his memoranda in his book in plaintiff's office, near the east window, and that he looked over Steele's shoulder to see that he made a proper memoranda. McCurdy further swears that on that occasion the defendant was somewhat agitated—don't recollect whether she was weeping or not. He further said on cross-examination, "I can't give the language used. I can't give the substance of what either party said." The testimony of the plaintiff and these two witnesses, Steele and McCurdy, is all there was offered by plaintiff as to what took place at the time he claims the account was stated.

There were two or three witnesses testifying to the defendant going to plaintiff's office on other occasions with an abstract, and saying she was going to borrow money to pay plaintiff.

The defendant testified that she lived on a farm near Elgin. "Am widow of Charles Hopkinson. After my husband's death I got a telegram from plaintiff, and went to Chicago to see him. He was anxious to do our business, and I gave it to him. He afterward sent me a bill, and I and Lilly went to his office. Saw Steele and McCurdy there. No one but plaintiff was there when we got there. He said he wanted his pay and would not close up the estate unless I gave him a note or something to secure his pay.

"There was considerable said between us; I can not recollect; I was very indignant, but I told him I would pay him every cent I owed him. I was much agitated and can not remember all. I objected to his bill all the way through; that it was too large. I wanted to get the matter settled. The substance of the conversation was, that he would do no more until he got his money. He then called these gentlemen into

the room and I said no more. After they came in I said, 'I will pay you every cent I owe you,' and then went out of the room. I was crying at the time, and was begging him to close up the estate and he would get his money.

"There was then no memoranda written in Steele's book, and no such conversation as shown in Steele's book. Mrs. Johnson (Lilly) was with me. The parties that plaintiff called in were there when I left. I never spoke to them. We never spoke about calling them in."

The affidavit of Mrs. Johnson (Lilly) was then read in evidence on behalf of the defendant. She stated that she was at the plaintiff's office with the defendant when a settlement was attempted, and that after some preliminary talk had been had between plaintiff and defendant about the account, certain persons surreptitiously appeared there who seemed to have come in as listeners to the conversation, and the defendant then forebore to make further conversation about her affairs, in their presence; that no such statements or admissions were made as stated in Steele's and McCurdy's depositions or recorded in a book, nor any memoranda made in her presence, and no such agreement as claimed was made; but the defendant then claimed the account was incorrect and did not confirm it.

The foregoing is all the material testimony in support of and against the settlement and account stated. The plaintiff and both his witnesses, McCurdy and Steele, swear that neither Steele nor McCurdy was in plaintiff's office when the discussion and dispute about the account began.

McCurdy says the settlement was made before he got in; Steele says substantially the same, and they both swear to what the *plaintiff repeated over after they got there*, as to what the agreement was, and while there is an attempt on their part to swear the defendant into acquiescence to what the *plaintiff* said about the settlement and its terms, they both utterly fail on cross-examination to repeat a single sentence or even the substance of anything the defendant said on that occasion, but give their conclusions against the objections of defendant. These witnesses do not agree with each other as to what occurred on that occasion.

McCurdy swears Steele made his memoranda in his book in plaintiff's office at the window and that he stood by him and looked over his shoulder to see if he got it right. Steele says he did not make the memoranda there but made it in his own office after the parties had all gone. The conduct of the plaintiff in calling these lawyers from side rooms to be witnesses for him against this woman, his own client, in an attempted settlement, while the relation of client and attorney still existed, is open to severe and just criticism and can not meet with our approval. Nor does the conduct of these two witnesses stand in any better light in their readiness to be witnesses against this woman under the circumstances. They knew she was his client, and they knew, or ought to have known, that his professional obligation to her was violated by the methods then adopted. If she was consenting and agreeing to the alleged settlement and approving the plaintiff's account it would have been quite as easy to have her indorse such approval on the bill and sign it as to call in these lawyers to witness it, and have them write it in a book. Inasmuch as the plaintiff declined to open up his dealings with his client by a proper declaration for that purpose, but chose to risk his case on an account stated, the burden of the proof was on him to show by a fair and clear preponderance of the evidence that such an account had been fairly and justly stated. We think the proof fails to establish that fact, under all the circumstances of the case, and that the verdict was therefore against the evidence.

The defendant also insists the court erred in the admission and rejection of testimony. We think the court erred in several instances in permitting witnesses, McCurdy and Steele, to state their conclusions instead of requiring them to state what was said.

Witness McCurdy was asked this question: "State whether or not defendant assented to the balance found due on that occasion, and if so in what way."

Ans. "She did assent. I can not tell now from recollection whether it was by a nod of the head or by words but I know she assented." Defendant objected to this answer and

moved to have it stricken out, which was refused by the court. The answer is but the conclusion of the witness and should not have gone to the jury. The question and answer were vital and important. Her assent could only be manifested by saying or doing something and the witness should have been required to say what she did or what she said.

Again McCurdy was asked: "Have you now stated all you can recollect she said on that occasion?"

Ans. "There was some conversation as to a compromise of this amount, as I understood it, before the then ensuing holidays, in which it was agreed that if \$2,000 was paid in cash before the holidays that should close the account." The defendant objected to this answer and moved to have it stricken out, but the court overruled the motion. This was error. The statement that the parties *agreed* to a settlement is a conclusion, and should not have been allowed. Again he was asked: "What did she say on that subject?" Ans. "She agreed to what the General said about the amount that was due, a little over \$3,000." The defendant objected to this answer and was overruled. The answer was but a conclusion and not responsive to the question, and ought to have been stricken out.

The witness Steele was asked the question: "Who called you in?" In addition to answering the question, he goes on at considerable length and tells what occurred in the office between the parties after he got in. In this answer he also states conclusions of what was said and done. The defendant objected to all the answer not responsive to the question, and asked to have it stricken out, but the court refused to do it. In this the court erred. Without noticing numerous other objections of this same class appearing in the record, where improper answers of witnesses were allowed to go to the jury against the defendant and against her objections, we will notice the error assigned in the refusal of the court to admit proper testimony offered by the defendant. The original account filed by the plaintiff, contained a "lump" charge of \$5,000 as an agreed fee.

On the trial of the case, plaintiff and his witnesses have testified to what occurred, and what defendant said on the occa-

sion of the alleged settlement in November at plaintiff's office.

When the defendant was on the witness stand testifying, and giving her version of what was said and done at the same time and place, she was asked this question: "Can you mention some of the facts in reference to the charges? do you remember the fact that there was anything said about a lump charge of \$5,000?"

The plaintiff objected, and the court sustained the objection. We are wholly unable to understand why this objection should have been sustained. It was competent and proper for several reasons, and it should have been allowed.

It was seriously prejudicial to the defendant to cut off the plaintiff's explanation for making a \$5,000 charge without an item being stated, and then to offer to take \$3,038.59, and then still further to offer to "cheerfully" receipt his bill for \$2,000, if paid by the 1st of January.

The question asked of the defendant opened up a branch of the case which she was refused the right to investigate, and that was as to the right of the defendant to go back of the alleged settlement and statement of the account (even conceding that such settlement and statement had been made), and look into the fairness and reasonableness of the charges made as they grew out of the original transaction. The court in the admission and rejection of the evidence as well as in the instructions given and refused, seems to have proceeded on the theory that a statement of account made between attorney and client, was conclusive upon the client. This may be the rule as among strangers where no relation of confidence or trust exists, and where neither has a right to look upon the other for protection against fraud or oppression, or undue advantage. But this rule, if it ever had any existence as between persons holding confidential, trust or dependent relations toward each other, seems to have been relaxed as to them.

The defendant interposed the general issue, which was a denial of the whole of plaintiff's claim, and put him upon its proof, and then filed a plea of set-off, which would entitle her to recover anything she could prove herself entitled to.

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The case of Gruby v. Smith, 13 Ill. App. 43, seems to be in point, and is a case in many respects like the one at bar. The opinion of the court was delivered by that learned jurist, Judge McAllister. The suit in that case was brought by Smith, as attorney at law, before a justice, against Gruby, a tailor, to recover for legal services. Before the justice the plaintiff sought to recover on a *quantum meruit* theory. On appeal to the Circuit Court he changed his ground and sought to, and did, recover solely on the ground of an alleged account stated. In the opinion of the court Judge McAllister says: "It may be gathered from the record that the defendant sought to go into an investigation of the merits of some of the items charged by the plaintiff, but, on objection by the plaintiff, the evidence was excluded. Some of the items in plaintiff's account, which was in evidence, seem to us to be excessive and extortionate, and we think great injustice has been done the defendant by the verdict and judgment." In speaking of the failure of the plaintiff to make out his case by a preponderance of the evidence, the court further says that "the fact that nothing of the kind (an account stated) was pretended on the trial before the justice, which occurred but a few days after the alleged accounting, and the not giving any testimony of it there, but springing it on the defendant for the first time on the trial in the Circuit Court, the circumstances under which it took place, the way the witnesses happen to be conveniently present, and the manner in which they testify, all conspire to show this to have been an adroit device on the part of this attorney to collect of his client an excessive and extortionate bill."

"The fact that the relation of attorney and client subsisted between the parties at the time of this alleged assent to a grossly exorbitant bill, and promise to pay such balance, should have had an important if not controlling effect upon the question whether any such assent and promise were voluntarily given or made on the part of the defendant, and upon the point of permitting an investigation by him into the merits of the several items of the bill. But it seems that relation was entirely ignored."

In that case this instruction was given: "The jury are instructed that in an action upon an account stated, the original form or evidence of the debt is immaterial, for the stating of the account changes the character of the cause of action and is in the nature of a new undertaking. The action is founded, not upon the original contract, but upon the promise to pay the balance ascertained; if the jury find from the evidence that there were accounts rendered by both parties to this suit, the one to the other, and a balance agreed upon in favor of the plaintiff, and a promise made by the defendant to pay the balance, then you must find for the plaintiff not exceeding the amount so agreed upon and promised."

This instruction was held wrong and misleading: *first*, because it ingeniously told the jury that the original merits or extortionate character of plaintiff's charges were entirely immaterial, and that such account was absolutely conclusive; and *secondly*, because, while purporting to give the jury all the elements necessary to a recovery, it wholly omits any reference to the relation of attorney and client, and whether the defendant was fully and fairly informed in respect to material facts. The parties not dealing upon a footing of equality, those matters should have been embraced. This case is in all material respects, in fact and law, like the one at bar. And the same rule was held in *Dickinson v. Bradford*, 59 Ala. 581.

In that case the court use this language: "If they (attorneys) assume the relation and enter upon the duties, thereby inviting confidence and acquiring influence without stipulating the means of compensation, no subsequent agreement with the client can be supported unless it is satisfactorily shown that the compensation does not exceed a fair and just remuneration for the services which have been, and which it is, the duty of the attorney to render."

Again in *Jennings v. McConnell*, 17 Ill. 148, the Supreme Court, Scates, C. J., use this language: "In the relation of client and attorney or solicitor, there is that confidence reposed in the latter which gives rise to very strong influences over the actions, rights and interest of the former. Hence the law with a wise providence not only watches over all the

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transactions of parties in this relation, but often interposes to declare transactions void, which between other persons would be good. And this is applicable to contracts and gifts generally, while the confidential relation continues, and is not confined to any particular property about which the attorney may have been employed. It is not required that the client should establish fraud or imposition; the *onus* of proof, upon showing the relation when the contract or gift was made, is upon the attorney to show fairness, adequacy and equity, and upon failure to make such proof, courts of equity treat the case as one of constructive fraud. The highest degree of good faith and fairness is expected and exacted."

This and the two preceding cases both go the full extent of holding that the business transactions between an attorney and client may be investigated in a controversy between them; but they go farther, and hold that the burden of proof is on the attorney to show the justice and fairness of his demands.

Under the authority of the cases above cited we think the defendant had the right, on the trial, to go back of the alleged settlement and investigate the character and justice of the plaintiff's original charges for all services rendered under his employment and during the existence of the time covered by the relation of client and attorney, and show if she could, that they were exorbitant and unjust. No mere trick or device of pleading can deprive her of this right. If this large sum of money was honestly earned and justly due the plaintiff, he ought not obstruct the way to the fullest and fairest investigation of his dealings with his client.

We think the circumstances surrounding this transaction, from beginning to end, justify the wisdom of this rule. The defendant was a woman deprived of the assistance and counsel of her husband. The plaintiff had done or pretended to do some business for him in his lifetime. On the death of the husband, the plaintiff sought out the defendant, and was employed at his own request. After his bill had reached from \$3,000 to \$5,000, the business is not yet done, and he presents a \$5,000 lump charge, and demands payment or settlement, and notifies her that he will do nothing more with her business, nor proceed

with it until his bill is settled. Already had the estate dragged more than a year beyond the legal period for settlement. The defendant is urging him to finish the work he was employed to do, and tells him when that is done she will pay him every cent she owes him.

Under these circumstances she was peculiarly in his power. She had already paid him a good deal of money. He understood all about her business, and he knew her necessity for the services of an attorney until her work was finished. It was utterly impracticable at that stage of the business, for her to discharge him and employ other counsel. He knew this and she knew it. He calls a halt to compel compliance with his demands knowing the advantage of his position and the necessities of his client. We think a settlement obtained under such circumstances between attorney and client entitled to but very little weight, and that the burden rests on the plaintiff to show its correctness and fairness.

Again the defendant assigns for error the giving of plaintiff's instructions. The question involved in this assignment of error has already been considered in connection with the refusal of the court to allow the defendant to answer the question propounded to her. Under the rule laid down in *Gruby v. Smith, supra*, the instructions given for plaintiff were all erroneous.

First, because the legal effect of them was to tell the jury that the supposed statement of account was final and conclusive against the defendant.

Second, because all of the instructions ignored the relation of client and attorney, and did not correctly state the law as between client and attorney, as held in the cases above cited, and which we hold to be the law governing this case.

Lastly, the defendant assigns for error that the court erred in refusing to give her second and third instructions. We think the second instruction ought to have been given. It was asked under the defendant's theory of the case, and under that theory it was correctly drawn. There was evidence in the record tending to support it. The last instruction was properly refused. It did not state a correct principle of law.

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Upon the whole record we are satisfied that the defendant has not had a fair and impartial trial in conformity with the law, and for the errors herein stated the judgment is reversed and cause remanded.

Reversed and remanded.

HANNAH WHEELER, IMPLEADED, ETC.,

V.

SETH GAGE.

Chattel Mortgages—Foreclosure—Release of Homestead—Defective Acknowledgment—Statutes.

1. A strict compliance with both the substance and form of the statute in regard to the execution and acknowledgment of deeds and mortgages, is necessary to make the same effective to convey the homestead.

2. In the case presented, it is *held*: That the court has jurisdiction of the appeal under the certificate of the circuit judge; and that Sec. 76, Chap. 110, R. S., has no application, the title to real estate being only incidentally involved.

[Opinion filed December 8, 1888.]

IN ERROR to the Circuit Court of Kankakee County; the Hon. OWEN T. REEVES, Judge, presiding.

Mr. STEPHEN R. MOORE, for plaintiff in error.

Inasmuch as the homestead estate can only be extinguished by a deed "acknowledged in the same manner as conveyances of real estate are required to be acknowledged," and inasmuch as this deed is not so acknowledged, it follows that this deed does not divest the homestead right.

The homestead act is remedial in its nature, and must be so construed as to most effectually meet the benevolent object of the law. *Deere v. Chapman*, 25 Ill. 610.

The homestead is a right which can not be taken from the wife and children in any other way than that prescribed in the act itself. *Pardee v. Lindley*, 31 Ill. 187.

The release must be expressly made in the mode pointed out by the statute. *Miller et al. v. Marckle*, 27 Ill. 402; *Kitchell v. Burgwin et al.*, 21 Ill. 45; *Vanzant v. Vanzant*, 23 Ill. 541.

Mr. H. K. WHEELER, for defendant in error.

It will be found that each of these mortgages has the statutory requirements to make a good conveyance of a homestead. The precise words required by the statute are used.

What does the phrase, "acknowledged in the same manner as conveyances of real estate are required to be acknowledged," in Sec. 4, Chap. 52, refer to? Is it to be construed in connection with Sec. 28 of the conveyance act, or will it be governed by that portion of the conveyance act which relates solely to homesteads?

These mortgages are conveyances of personal property, and do not purport to convey real estate. The chattel mortgage was made in conformity to the laws, and duly acknowledged as such, but as the homestead laws give a homestead in a leasehold estate, then the homestead interest must be conveyed and released as homestead interests are conveyed in real estate. In other words, a homestead where the parties own the real estate should be governed by the laws regulating conveyances of real estate. Where the property is chattels it should be conveyed according to the laws regulating conveyances of chattel property. This would be equally true of the acknowledgments. If this acknowledgment should have been made as contended for by counsel for plaintiff in error, then it would have been in violation of the statute in regard to chattel mortgages, and if it required a real estate acknowledgment, then there could be no valid conveyance made of the property.

We insist Sec. 4 of Chap. 52, R. S., regulating the conveyance and acknowledgment of the homestead interest, relates

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to Secs. 12 and 28 of Chap. 36, regulating conveyances, and should be construed in connection with those sections so as to, if possible, give full force to each. It has already been shown these conveyances are in harmony with Sec. 12 so far as conveying the homestead interest. Sec. 27, which counsel claims governs this case, only purports to give a form of acknowledgment that acknowledges a conveyance of the fee, but no form is given by that section for a release or waiver of the right of homestead. Clearly, then, Sec. 4 of Chap. 52, where the phrase, "acknowledged in the same manner as conveyances of real estate are required to be acknowledged," is made use of, refers to Sec. 28 of Chap. 32, because Chap. 52 relates solely to exemptions. Sec. 4 purports to regulate the "release, waiver or conveyance" of the homestead interest. That being the object of the act, and no other object being under consideration, it must certainly have been the intention of the Legislature that the conveyance and release of the homestead interest should be made as provided in the conveyance act relating to the conveyance and release of the right of homesteads.

The phrase, "acknowledged in the same manner as conveyances are required to be acknowledged," refers, of course, to conveyances affecting the homestead, as that section relates only to homestead interests.

C. B. SMITH, J. This was a bill in chancery to foreclose two chattel mortgages on a dwelling house and milliner's store built on leased ground. The cause was heard on bill, answer and replication, and the evidence taken in the Kankakee Circuit Court, and the court granted a decree of foreclosure according to the prayer of the bill.

Appellant has sued out a writ of error, and asks to have the decree reversed for the errors assigned. The case is here under a certificate of the judge under Sec. 76 of the practice act of this State. The answer admits the making of the mortgage, but claims that the homestead was not released in the execution and acknowledgment of the mortgage, and claims a homestead in Hannah Wheeler, the wife of James

Wheeler, who has died since making the mortgages. Whether the acknowledgments of the two chattel mortgages released the homestead is the only question presented to us by this record, and is the only question argued by counsel, except the question of jurisdiction of the court under the certificate of the judge.

The chattel mortgages are in the usual form and both cover the same property, viz.: the frame two-story building used as a millinery store and dwelling, situated on the north part of lot 1, block 43, in Momence. The acknowledgment to the first mortgage is as follows:

"STATE OF ILLINOIS, }
"Kankakee County, } ss. I, M. O. Clark, a justice of the
peace in and for the town of Ganeer,
in and for said county, do hereby certify that this mortgage
was duly acknowledged before me by the above named James
Wheeler and Hannah Wheeler, the mortgagors therein named,
and entered by me this 27th day of May, A. D. 1882, includ-
ing the release and waiver of the right of homestead.

"Witness my hand and seal.

"M. O. CLARK,
"Justice of the Peace."

The acknowledgment to the second mortgage is in the following form, viz.:

"STATE OF ILLINOIS, }
"Kankakee County, } ss. I, M. O. Clark, a justice of the
peace in the town of Ganeer in and
for said county, do hereby certify that this mortgage was duly
acknowledged before me by the above named James Wheeler
and Hannah Wheeler, the mortgagors therein named, as their
free act and deed, including the release and waiver of the
right of homestead, and entered by me this 11th day of
June, 1883.

"M. O. CLARK,
"Justice of the Peace."

In the body of both the chattel mortgages the right of homestead was expressly waived and released. It was con-

coded by appellee that appellant has a right of homestead in the premises described, unless it was properly released by the mortgagors, and he contends that the acknowledgment to both mortgages was sufficient under our conveyance and homestead acts to operate as a release of the homestead right. Appellant, on the contrary, insists that the acknowledgments were inoperative to release the homestead right.

The court below was of opinion that the homestead was released, and so decreed, and ordered the property sold without setting off the homestead. In this we think the court erred. Sec. 1, Ch. 52, R. S., gives a householder a homestead and provides that "such homestead and all right and title therein shall be exempt * * * from the laws of conveyance, * * * except as hereinafter provided."

Sec. 4 provides that "no release, waiver or conveyance of the estate so exempted shall be valid unless the same is in writing, subscribed by said householder and his or her wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged."

Sec. 25, Ch. 30, R. S., provides that "no judge or other officer shall take the acknowledgment of any person to any deed or instrument of writing, as aforesaid, unless the person offering to make such acknowledgment shall be personally known to him to be the real person who and in whose name such acknowledgment is proposed to be made, or shall be proved to be such by a credible witness, and the judge or officer taking such acknowledgment shall, in his certificate thereof, state that such person was personally known to him to be the person whose name is subscribed to such deed or writing, as having executed the same, or that he was proved to be such by a credible witness (naming him)."

Sec. 27, Ch. 30, gives the form of an acknowledgment. This form requires the officer to state in his certificate that the grantors were personally known to him; and further, that the grantors appeared before him in person on the day of the acknowledgment and that they acknowledged the instrument as their free and voluntary act for the uses and purposes there set forth.

Sec. 28 of the same act provides that, in cases where it is intended to release the homestead, then the certificate of acknowledgment shall contain a clause substantially as follows: "Including the release and waiver of the right of homestead."

The foregoing are the several sections of the statute relating to the estate of homestead and the manner of its release so far as they relate to this controversy.

It will be seen that both the body of the chattel mortgages as well as the certificates of the officer to both the mortgages, contain a release of the homestead, and in that respect no objection can be made to the certificate.

But it will be seen that both certificates are fatally defective in other respects and wholly silent upon material matters required to be therein stated, by the 25th section of the statute above quoted. There is no statement in either certificate that James and Hannah Wheeler were known to the officer to be the same persons who signed the mortgage, or that they were proven to be the same persons by a credible witness, nor that the Wheelers personally appeared before him on the day of the acknowledgment or on any other day.

We regard these omissions in the certificate of the officer as fatal. The omitted provisions are clearly and explicitly required by the statute to be in the certificate to make it valid and operative for the purpose of releasing the homestead. This construction of the statute has been adopted in many decisions of our own Supreme Court. *Boyd v. Cudderback*, 31 Ill. 113; *Smith v. Miller*, 31 Ill. 157; *Vanzant v. Vanzant*, 23 Ill. 541; *Best v. Cohlson*, 89 Ill. 465; *Warner v. Crosby*, 89 Ill. 320.

Many other cases might be cited in support of the same construction given the statute, but the foregoing are amply sufficient to show that the question seems to be settled and not open to further controversy.

We fully agree with the construction given to the statute. We hold that there must be a strict compliance with both the substance and form of the statute in the mode of executing and acknowledging deeds and mortgages, for the conveyance of land, or any interest therein, in order to make the deed or mortgage effective to convey the homestead.

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We think this court has jurisdiction of this appeal under the certificate of the judge, and that the statute which provides that the court shall have no jurisdiction under the certificate of the judge when the title to real estate is involved, is not applicable to this case. The title is only incidentally involved.

The object of the proceeding is to enforce payment of the mortgages and, upon failure to pay, asks that the real estate may be sold to compel payment. This does not involve the title in the sense of the statute. The statute only applies when the title is the main contention in the suit and is directly involved.

The decree of the Circuit Court is reversed and cause remanded, with directions to proceed in harmony with the views expressed in this opinion.

Reversed and remanded.

BERNARD MURTAUGH
V.
THOMAS COLLIGAN.

Negotiable Instruments—Notes—Forgery—Ratification—Inconsistent Defenses—Evidence—Instructions—Set-off.

1. It is improper to give instructions in support of inconsistent defenses.
2. In an action on a note and to recover money paid by the plaintiff as surety on a second note, the defendant can not repudiate the second note because it was raised in amount after it was executed by him as maker, and at the same time deny his liability on the first note on the ground that it was paid by the proceeds of a transfer of the second note.
3. A promise by the purported maker to pay a forged note binds him without any new consideration, provided he has full knowledge of the facts affecting his rights.
4. Where a note is assigned after maturity, matters of set-off in favor of the maker as against the payee, accruing after such assignment, can not be allowed.

[Opinion filed December 8, 1888.]

APPEAL from the County Court of LaSalle County; the Hon. FRANK P. SNYDER, Judge, presiding.

Messrs. R. D. McDONALD and A. R. GREENWOOD, for appellant.

It is a general rule that when the plaintiff makes out a *prima facie* right to recover, as was done in this case, if the defendant seeks to avoid the recovery of a judgment on the note, he must show by a preponderance of the evidence that such note was paid before the plaintiff became the owner of it. The burden of proof is upon him to rebut every presumption in favor of the plaintiff.

It is a presumption of law that a note was assigned before maturity. *Mulford v. Shepard*, 1 Scam. 583; *Mobley v. Ryan*, 14 Ill. 51; *Richards v. Bitzer*, 53 Ill. 466; *Clark v. Johnson*, 54 Ill. 296.

It is a rule of law that, unless otherwise specially agreed upon, the taking of a promissory note for a pre-existing debt, or a contemporaneous consideration, is treated *prima facie* as a conditional payment only; that it is a payment only if it is duly paid at maturity. *Story on Promissory Notes*, Chap. 3, Sec. 104; *Heartt v. Rhodes*, 66 Ill. 356; *Burdick v. Green*, 15 Johns. 247.

The second instruction is erroneous in this, that it tells the jury the mere giving of the \$150 note to Cain by appellee on February 5, 1885, and that Mathew Colligan obtained \$150 on it, operated as a part payment of the \$242.25 note, but does not state that the appellee afterward paid the \$150 note, or any part of it. This instruction can not be sustained by the above authorities.

In the case at bar the appellee was the one to be benefited by procuring the loan from Patrick Cain, and appellant was assuming a liability as a mere friendly act to aid appellee in getting the money from Cain on the note, and when sued by Cain and compelled to pay the judgment, he (appellant) was subrogated to all the rights of Cain under that judgment, and he had a right to sue on the \$242.25 note that he held as collateral security, as the evidence shows, or he had the right

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to pursue appellee on the \$250 note to reimburse himself for the money paid on the Cain judgment. This was all appellant was seeking to do. *Harvey v. Drew*, 82 Ill. 606; *Hoyt v. Lock*, 41 Ill. 119; *Klein v. Mather*, 2 Gilm. 317.

Messrs. MOLONEY & STEAD, for appellee.

LACEY, P. J. This was an action in assumpsit by appellant against appellee. The declaration contained one special count, based on a promissory note given by appellant to Mathew Colligan, for \$242.25, dated February 15, 1884, due in nine months after date, with eight per cent. interest from date, and indorsed by the payee to appellant, and the ordinary common counts.

It appears from the evidence that Mathew Colligan, who was the son of appellee, held the note above described, on his father, and, as testified to by the father, on February 5, 1885, the appellee and his son had a settlement and agreed there should be \$100 credited on the note on account of the wages of a minor son of appellee laboring for Mathew in Nebraska for about one year up to that time. That would leave, as they agreed, \$150 due on the note.

The appellee, in order to pay his son this balance on the note, was then to raise money on his own note with security which, when raised, was to be applied on the balance due on the note in question. In pursuance of this arrangement appellee executed to Patrick Cain his note for \$150, dated February 5, 1885, due in one year after date, with eight per cent. interest from date, and gave it to his son Mathew, who was to obtain the security on the note, and then negotiate it to Cain and obtain the money on it. The old note was not given up by Mathew, but was to be sent to appellee. Now, as is claimed by appellee, before presenting the note to the sureties to be signed, said Mathew, without the knowledge or consent of appellee, raised the note to \$250 and then procured the signatures of appellant and Maurice Colligan, and then presented the note to Cain and obtained \$250 on it. As is shown by the evidence of appellant, about the time he signed the note as

security Mathew indorsed and delivered to him the old note as security against signing the new note.

Afterward appellant was sued on the \$250 note which he had signed as security, in a suit against him and Maurice Colligan, and judgment was rendered against them, and appellant had to pay \$287.77 to Cain, besides costs. This last amount is the basis of the common counts for money paid out at appellee's request.

Appellee now in this suit repudiates his liability to pay any part of the money paid by appellant by reason of his being security for him on the new note, because the note was raised by his son, and, if we understand the theory of instruction number two, given for appellee, he insists the old note was paid, or more properly, the balance due on it of \$150, by the money his son Mathew received on the raised note of Cain. The portion of the instruction referred to reads as follows: "And if the jury further believe, from the evidence, that the said note (the old note) was paid by the giving of a new note on February 5, 1885, for the sum of \$150, by Thomas Colligan to Cain, upon which note the said Mathew Colligan secured from the said Cain the sum of \$150 to apply on the said note of \$242, and by the payment of \$92 on the said \$242 note in work and labor, then the jury are instructed that the plaintiff in this case can not recover on the said \$242 note;" and the next and third instruction tells the jury that, in the event the new note in question was raised without the consent of appellee, then he would not be liable on it as principal, and appellant could not recover for having paid as surety. Thus the appellant was closed out entirely by these instructions as to defenses entirely inconsistent with each other. If the appellee is allowed to repudiate his being principal on the new note then the money was not raised by him or on his responsibility, which he claims he should be credited for in discharge of the old note to the amount of \$150. In that event appellant would have raised this money on his own name, without any recourse on appellee. He would have recourse on Mathew on account of the fraud perpetrated on him, and therefore the old note which Mathew gave him would rightfully be the

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property of appellant to reimburse him for the money he had wrongfully paid on the Mathew account. If the appellee acknowledges his liability on the new note as principal, then the old note is paid and the appellant can recover on the common counts. But both these inconsistent defenses can not be made, and the jury should have been so told. The appellant had a clear right to recover either on the old note or for money paid out to appellee's use, unless appellee could show some other defense to the old note. This he attempts to do by claiming a set-off to the note to the amount of \$100 for work and labor performed by his minor son John for Mathew in Nebraska, after the note was indorsed to appellant by Mathew, to secure him against liability on the new note, in addition to the \$100 agreed to be credited by Mathew on the note for labor before the new note was made out; also \$64 that Mathew, in 1880 or 1881, on division of property by appellee among his children, agreed to pay to one Blanchard, on a debt owed by appellee, and which, subsequently to the indorsement of the old note to appellant, appellee was compelled to pay. We must consider whether either of these claims was a valid set-off against the said note. We think clearly the first, and probably the second was not. Sec. 12, Chap. 98 of the R. S. (Negotiable Instruments) provides that in case a note is assigned after due, a set-off by the maker against the payee may be allowed, "if such demand be such as might have been set off against the assignor while the note or bill belonged to him."

It will be seen that the account of appellee against Mathew for labor of his son in 1885-6, had not accrued when appellant became the holder of the old note, and under the statute could not have been set off. This claim for labor accrued after Mathew had parted with the note. The old note and interest at the time of the settlement amounted to about \$261, and allowing the \$100 claimed for labor, a balance would exist of about \$161.

The \$64 was not paid till after the transfer of the old note, the balance on which, according to appellant's testimony, of \$150, had been found due. This item was not then claimed.

At best it is a stale claim, and, we think, could not be allowed as a set-off against the old note. It would be inequitable to do so. But even if this were allowed, there would still remain over \$90 due on the old note, and appellant has been allowed nothing.

As to the question of ratification by appellee to the holder of the \$250 note, we find the evidence quite strong. Appellee paid \$15 interest on the new note, but he says he paid it before he saw it, though he did not object afterward.

He says in his testimony: "I might have agreed to pay the \$250 note. I was excited. I may have agreed to pay it." When he went to Cain's to pay the interest he saw the note, and paid \$15 interest on it, and may have agreed to pay it. Patrick Cain testifies that he heard a conversation between appellant and appellee at the church door in La Salle, and appellee agreed to pay the note. "He said he did not want his wife to know anything about it."

The appellee's instructions tell the jury in substance that this would not bind him unless such promise was on "a valuable consideration;" presumably on a new consideration, different from what passed when the note was delivered. We understand the law to be that a promise by the purported maker, to pay a forged note, binds him without any new consideration, provided the promisor had full knowledge of the facts affecting his rights. *Gleason v. Henry*, 71 Ill. 109; 1 Parsons on Notes and Bills, 101; *Wilson v. Alexander*, 3 Scam. 392. The appellee's instructions, as given, were erroneous and calculated to mislead. It will not be necessary to notice the instructions in detail, as the views here expressed will be a sufficient guide in case of a new trial.

The judgment of the court is therefore reversed and the cause remanded.

Reversed and remanded.

McCulloch v. Ellis.

DAVID McCULLOCH
v.
THOMAS B. ELLIS.

Venue—Commencement of Suit in Wrong County—Practice—Remedies—Motion.

Where a suit is improperly brought in a county other than that in which the defendant resides or is found, service being made in another county, it is proper practice to quash the writ and return and dismiss the suit upon motion,

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. SHAW, Judge, presiding.

Messrs. McCULLOCH & McCULLOCH, for appellant.

The well-established rule in this State is, that, where process is defective on its face, or the return of service is, of itself, insufficient, the defect may be taken advantage of by motion to quash; but where the objection to the writ or service does not appear upon the face of the proceedings, but has to be shown by matters *dehors* the record, the objection must be made by plea in abatement. Greer v. Young, 120 Ill. 184; Holloway v. Freeman, 22 Ill. 197; McNab v. Bennett, 66 Ill. 157; Union Nat. Bk. v. First Nat. Bk., 90 Ill. 56; Rubel v. Beaver Falls Cut. Co., 22 Fed. Rep. 282; Holton v. Daly, 106 Ill. 131; Hearsay v. Bradbury, 9 Mass. 96; Beam v. Parker, 17 Mass. 601; Guild v. Richardson, 6 Pick. 368; Charlotte v. Webb, 7 Vt. 48; Lillard v. Lillard, 5 B. Mon. 340.

If, at the time of the commencement of the suit, appellee was a resident of Peoria county, the issuing of the *alias* writ to Rock Island county was proper; for the plaintiff, having commenced his suit properly, is not to be deprived of the benefit thereof by the defendant's changing his residence before service. Funk v. Ironmonger, 76 Ill. 506.

When the original writ has been properly issued, although not served, an *alias* may go to another county. Funk v. Ironmonger, *supra*; Hughes v. Martin, 1 Ark. 386.

Mr. GEORGE W. SPAHR, for appellee.

LACEY, P. J. Summons was issued in favor of appellant against appellee in Peoria county and directed to the sheriff of that county, dated July 15, 1887, and returned by the sheriff, "Thomas B. Ellis not found in this county this 23d day of September A. D. 1887." *Alias* summons was issued directed to the sheriff of Rock Island county and returned served on the appellee by the sheriff of that county, November 26, 1887.

There was a declaration in assumpsit for legal services filed by appellant. At the February term, 1888, appellee entered a special appearance by attorney and moved the court to quash the writ and return thereon, and to dismiss the suit; which motion the court sustained, quashed the writ and return, and dismissed the suit and entered judgment against appellant for costs. To reverse said judgment this appeal is taken. In support of the motion to quash, appellee filed an affidavit showing that, at the time of service of the summons and commencement of the suit, he was a resident of Rock Island county, and ever since has been, and not of Peoria county, and appellant filed a counter affidavit showing that appellee was present in Peoria when the first writ was issued and suit brought.

The appellant insists that the summons and return should not have been quashed and the suit dismissed on motion; that plea in abatement should have been filed by appellee; and secondly, that the suit should not have been dismissed. We think there was no error in the action of the court. It appeared on the face of the record that the appellee was served in a different county from the one in which he was sued. The service and return on the summons both showed it, at least *prima facie*.

There was nothing in appellant's affidavit to show that appellee was a resident in Peoria county at the time the suit

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was brought or afterward, and we think that the words, "may be found," in the statute, have reference to the service alone. The affidavit of appellant only proved his personal presence in the county at the time the suit was brought, not that he was a resident.

It is not necessary in a case like this to file a plea in abatement. The relief may be obtained on motion. It appears to be the proper practice. In *Safford v. Sangamon Ins. Co.*, 88 Ill. 296, where motion was made by the defendant to quash the writ, the court say: "The motion to quash the summons ought to have been allowed. On that motion it was shown to the court that this was a case in which the issue and service of this summons was forbidden by statute." See also *Kenney v. Greer*, 13 Ill. 432-450.

It is strenuously claimed that the suit ought not to have been dismissed. We are of opinion that the ruling in that respect was correct. The statute provides that it shall not be lawful to sue any one out of the county where he resides or may be found. The record showed that this was done in this case.

The appellee was sued in Peoria county, where he did not reside, against the express prohibition of the statute. Appellant had no right to have the suit remain on the docket to worry and annoy the appellee, and it was proper and right to dismiss it.

It would have been lawful to either quash the declaration or dismiss the suit. See cases above cited. It was unlawful to plant the suit in Peoria county.

There being no error in the record the judgment is affirmed.

Judgment affirmed.

CITY OF ABINGDON

V.

CLINTON H. MEADOWS ET AL.

28 442
e109 273*Instructions—Fast Driving—Ordinance—Abstract.*

1. An instruction in the nature of an argument upon the facts and the duty of the jury in the premises, is erroneous.
2. The instructions must be in writing, unless that form is waived by the parties, and relate only to the law of the case.
3. Every intendment being in favor of the judgments of a court of general jurisdiction, where complaint is made of certain instructions, all others given should also appear in the abstract.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. WILLIAMS, LAWRENCE & BANCROFT, for appellant.

Mr. F. F. COOKE, for appellee.

C. B. SMITH, J. This was a prosecution brought against appellees before a justice of the peace for violating an ordinance of the city of Abingdon, and was appealed to the Circuit Court of Knox county. A trial was then had resulting in a verdict and judgment for the defendants. Appellant brings the case here for review. The ordinance in question is as follows:

“Whoever shall purposely and rapidly or immoderately ride or drive any horse or mule or other domestic animal or any team in any street or alley in the frequented part of the city * * * shall be subject to a fine of not less than \$3.”

The defendants were charged with violating this ordinance by rapidly and immoderately and purposely driving their horses in one of the frequented streets of the city. That the

appellees were speeding their horses together in a frequented street is not denied. The proof is clear that the contest between the two men and their horses was in the nature of, and in fact was a race.

The contention of the defendants was that they were not driving so fast as to bring them within the prohibition of the ordinance. We think the proof clearly shows that this driving was voluntary and wilful and that it was both rapid and immoderate in a public street, and that it clearly came within the prohibition of the ordinance and that the verdict of the jury was manifestly against the evidence.

The first and second instructions appear to be similar to those given in the case of *L. & P. Ry. Co. v. Foster*, 43 Ill. 480, and are not obnoxious to the objections made. But conceding the erroneous character of these instructions we should not reverse on that ground, because of the failure of appellant to abstract its own instructions and bring them to the attention of the court; so that we can not say that their own instructions may not have cured any error complained of in appellant's instructions. Every intendment must be in favor of the judgment of a court of general jurisdiction.

After the jury had been out nearly twenty-four hours, the court on its own motion and without request from either party or from the jury, called the jury into court and gave them this instruction:

"The court of his own motion further instructs you as follows: One of the modes provided by our Constitution and laws for deciding questions of fact in common law cases, such as the one you are now considering, is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, mathematical certainty can not be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own conviction, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, without pride of opinion and without a partisan spirit, and with a proper regard and deference to the opinion of each other, and in conferring together, listen to each

other's arguments with a disposition to be convinced. You should consider that the case must at some time be decided and that it is important to the parties to this suit that it be done now and by you if it can be done properly. That you are selected in the same manner and from the same source from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men more impartial or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other; and with this view, it is your duty to decide the case if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other in all cases. In the present case the burden of proof is on the plaintiff, and if the city has failed thus to make its case by a clear preponderance of all the evidence in the case, you should find the defendants not guilty; on the one hand, if much the larger number of your panel are for a conviction, the dissenting jurors should consider whether the conclusion reached by them from the evidence is correct when the majority of the jury come to an opposite conclusion, when they are equally honest and equally intelligent and have heard the same evidence with the same attention, and with an equal desire to arrive at the truth, and under the sanction of the same oath; and on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

Sec. 52, Chap. 110, R. S. requires the court to instruct the jury in writing, and only as to the law of the case. The instruction complained of is in plain violation of this statute and is more in the nature of an argument upon the facts, and the duty of the jury upon the facts, than a statement of the law of the case.

The instruction was an invasion of the rights of the jury to determine for themselves when, if ever, they would agree,

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and what verdict they would render. The giving of this instruction was error.

The court had the right to recall the jury at any stage of their deliberations and to instruct them further upon the law of the case, either upon its own motion, or on the motion of either party, if they had not been fully and correctly instructed as to the law before retiring. It is not only the right but the duty of the court to see that the jury is fully and correctly instructed, and this the court may do on its own motion, but it must always be done in writing (unless that form is waived by the parties), and must relate only to the law of the case.

For the error in giving the above instruction, and because the verdict was against the evidence, the judgment is reversed and the cause remanded.

Reversed and remanded.

WILLIAM ENNOR
v.
THOMAS H. HODSON.

Negotiable Instruments—Note—Action by Assignee—Defenses—Holder for Collection—Settlement by Maker with Payee—Fraud—Instructions and Evidence—Review of—Signature—Practice—Verification of Plea—Time—Trusts—Dissenting Opinion.

1. The maker of a promissory note may settle the same with the real owner, and thereby defeat an action thereon brought by a holder merely for collection. Questions as to the sufficiency of the amount paid in settlement and whether the owner has been defrauded, can not be raised in such action.

2. In an action on a promissory note, it may be shown that the plaintiff is merely a holder for collection, in order to let in the defense of payment and settlement made to and with the payee.

3. The court below properly allowed, after the trial commenced, the verification of a plea denying the execution of the indorsement on the note in question.

4. In the case presented, this court, upon a review of the instructions and the evidence, finds that there was no error in giving, modifying or refusing the instructions asked, and that the evidence supports the verdict for the defendant.

5. Where a trustee has placed himself in a position antagonistic to the trust, he can not claim any benefit under the same.

6. A witness having testified that he is acquainted with a person's signature from seeing it attached to papers known to have been signed by him, is competent to testify to a supposed indorsement by such person.

[Opinion filed December 13, 1888.]

APPEAL from the Circuit Court of Jo Daviess County; the Hon. JOSEPH M. BAILEY, Judge, presiding.

Messrs. D. & T. J. SHEEAN, for appellant.

Messrs. E. L. BEDFORD and WILLIAM SPENSLEY, for appellee.

LACEY, P. J. The appellant sued the appellee in an action of assumpsit on a promissory note given by the latter to Alice Ennor, and averred to have been indorsed to appellant. The note was given in the sum of \$6,000, without interest, if paid when due, dated September 18, 1882, and due in twelve months from date.

There was a plea of the general issue and notice given in accordance with the provisions of the statute of several special defenses. 1. That the note was never indorsed by the payee to appellant. This was accompanied by affidavit sworn to. 2. The appellee, without notice of any indorsement, paid the payee the said note in full in a deed for eighty acres of land and the sum of \$3,442.43, in full satisfaction of the note. 3. That the note was only held by said appellant as the agent of Alice Ennor, and that it was indorsed fraudulently, and that the appellant paid no consideration for the note. The cause was tried by a jury and resulted in a verdict in favor of appellee, and the court, after overruling a motion for a new trial, gave judgment against the appellant for costs, from which judgment this appeal is taken.

On the trial of the cause two defenses were particularly relied on. The first was that the note had never been indorsed by the payee, and hence no recovery could be had on it in the name of appellant as the legal holder, as was attempted.

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The second was that even if the note had been indorsed by the payee, it was only indorsed for collection, and that after such indorsement the appellant's agency for collection had been revoked by the payee, and that she had settled the note in full with the appellee, and that nothing remained due on it.

Concerning the first issue in regard to the indorsement, the evidence was conflicting and contradictory, but as we view it sufficient to sustain the verdict. If that had been the only issue, and if the instructions given for appellee had not laid down the law as to the second point of the defense, it would not be necessary to examine the case further. But as the jury may have found for appellee on the theory that, while the note was actually indorsed by Alice Ennor, yet she was the equitable owner and had received full satisfaction of it from appellee, it results that the instructions and rulings of the court concerning the last named issue must be correct, and we must pass on those questions also. We must also pass upon the complaint of the appellant that the court erred in modifying his second and fifth given instructions, the modification complained of being that the court so charged them as to make the right to recover depend on the appellant being the equitable as well as legal owner of the note, instead of his being the legal owner only, as they were offered by appellant. This action of the court is one of the matters most seriously complained of by counsel for appellant. In discussing the merits of the defense offered, we will confine ourselves to the facts and circumstances and the law thereto applicable concerning the alleged payment of the note to Alice Ennor. It appears that appellant is the father of Alice Ennor, and that on May 29, 1878, he deeded to Alice the 160 acres of land afterward sold to the appellee, and for which the note in question was given, for a named consideration in the deed of \$4,500, which deed was duly recorded in La Fayette county, Wisconsin, where the land was situated, January 17, 1879. Alice Ennor, on the 18th day of September, 1882, deeded the land in question to the appellee in consideration of \$6,000 named in the deed, and for which the note in question was given to her for the amount. It appears that the appellant throughout the

entire transaction acted for Alice in making the sale of the land to appellee, taking the note and transacting the business generally. It appears, too, that Alice did not pay her father any money for the land. The appellant, after taking the note in question, held the same in his own possession, and claims that Alice, within about one month after it was given, indorsed it to him in her own hand, as appeared on the back of the note, the name of Alice purporting to be her own handwriting. Some time prior to May, 1885, Alice, who was at the time of the trial about fifty-nine years old, and her father, had a falling out, and she undertook to repudiate her father's right to act as her agent concerning the note any farther, and on the 4th of May, 1885, entered into a written contract with appellee wherein it is recited that the land in question was deeded to him under a contract that he was to subdivide said land into ten-acre tracts and sell the same, and make deeds to purchasers, and receive for such services all sums or amounts which might be realized over and above the sum of \$6,000, and was to be allowed, over and above the sum of \$6,000, the sum of \$100 for expenses, and that appellee was to be allowed at least \$30 per acre for the land remaining unsold when the agency should terminate; and further reciting that appellant retains said note and threatens to sue it and get the money into his own hands against her will, and reciting that the land had been attached as the property of appellant and the moneys realized from the said sale placed in the hands of a trustee to abide the event of the suit. It was therefore agreed in and by said instrument, and she did in terms revoke the agency of appellant in the matters in question and forbid his bringing suit against the appellee in the note, and she further agreed to receive the land remaining unsold (the eighty acres) back, which had been conveyed to appellee in trust, and the further payment to her of the \$3,442.43 remaining in the hands of E. L. Bedford, as trustee, in full satisfaction of her claim against appellee. The appellee showed in evidence a receipt signed by said Alice, dated August 24, 1886, in full for the \$3,442.43, and a deed back to her of the eighty-acre tract of land, in full compliance with the terms of said

last named agreement. The appellee further showed a notice in writing signed by Alice, directed to appellee, of August 16, 1886, notifying him that she never signed a note for \$6,000 to her father for the Elk Grove land and notifying him she would hold him responsible for the amount and authorizing him not to pay it to her father, as it belonged to her. The appellee further showed an indemnifying bond given by Alice to him of the same date with the receipt, agreeing to keep him harmless against the said note and all costs and expenses by reason of its being in the hands of appellant, and against any claim he or any one might have in the note. The evidence no doubt shows that the execution of the contract, the notice and the subsequent payment and accord with Alice was done at appellee's instance.

The appellee sold, in addition to the land for which the \$3,442.43 was realized, one other twenty-acre tract, and afterward received a deed back for it, but realized the sum of \$400 for it. The deposit of \$3,442.43 drew four per cent. interest per annum while the litigation between appellant and the Cleveland Iron Company proceeded, and principal and interest at the time of the date of said receipt amounted to about \$3,700, which, added to the \$400, makes \$4,100 realized by appellee out of the land. The evidence discloses that appellee only paid Alice Ennor, in cash, \$2,400, and gave her a deed for the eighty acres of land unsold, leaving in his hands \$1,790 unaccounted for. The evidence shows that appellee had some arrangement with Alice by which he was to keep this amount, but what that was—whether for fees for legal services (for appellee was an attorney at law) or for what purpose—the evidence does not disclose. It is claimed, in the argument of counsel for appellant, that the land in question was deeded by appellant to Alice Ennor, and the \$6,000 note taken in her name as a scheme to prevent the Cleveland Iron Company from reaching the land. It appears that the Cleveland Iron Company had a large judgment which they were trying to collect of the appellant, or, at least, it was in existence at the time of his deed to his daughter. If this theory were correct, and the land was really the land of appellant.

and was neither intended as a gift to his daughter nor was conveyed to her in consideration of his indebtedness to her for money used by him, left to Alice by her mother, and Alice indorsed the note back to appellant as his own, it would be conceded that the appellant had a right to recover on the note in question, notwithstanding any settlement made by appellee with Alice. The possession of the note by appellant with the indorsement would be sufficient notice to appellee that the note belonged to appellant. But, on the other hand, if the appellant never had any interest in the note except to hold it as the mere agent of Alice, we think it equally clear that she had a right to collect it from the maker, and the mere fact that the legal title to the note was in appellant for collection and that he held the possession, would make no difference. He, having no interest in the note, could not insist on its collection after it had been settled with the real owner. And such settlement may be made with the maker by the real owner of a promissory note as against the mere holder of it for collection, either before or after the suit is instituted. Even in case of the indorser of a note holding it as collateral security for a sum less than the face of the note and interest, the maker may have his defense against such indorser as he would have had against the payee, as to any balance due on the note over and above the amount for which the payee held it for security, even though the indorser were an innocent holder. Such defenses are allowed because it is equitable to do so, and it prevents circuity of action. *Steere v. Benson*, 2 Ill. App. 260; *Mayo v. Moore*, 28 Ill. 428; *President, etc., v. Chapin*, 8 Met. 40; *Jones v. Heffert*, 2 Starkie, 3 Eng. C. L. 356; *Atlas Bank v. Doyle*, 9 R. I. 76.

The same principle is involved here, and, on the theory of appellee's case, its application is more forcibly demanded, for the appellant received the indorsement knowing of the peculiar contract concerning the deeding of the land in question to the appellee, besides accepting the indorsement of the note as a mere volunteer. We therefore perceive no error in the modification of the appellant's second and fifth instructions in the particular complained of. The way the instructions read

when presented to the court, the entire defense of satisfaction of the note by agreement between Alice and appellee was cut off, provided appellant showed by a preponderance of the evidence that the note was actually indorsed by Alice to him and he retained the possession thereof; for then the legal title remained in him though the actual ownership might be in Alice, with whom the appellee had settled. It would have been error to have given the instruction as drawn. It follows, also, that the appellee's instructions given by the court, based on the idea of equitable title in Alice, the payee, and settlement with her, were proper and rightfully given.

The objection made that the court allowed the appellee to file a verification to the plea denying the execution of the indorsement after trial commenced, is not well taken. Under our present statute such amendments are allowable at any time before judgment; nor did the court err in refusing to strike special notice of defense from the files. No reason is suggested why such action was erroneous, and none occurs to us.

The objections to the admission of evidence for appellee are mostly answered and overruled in principle by the suggestions that we have already made, and we perceive no error in allowing appellee to testify to the supposed signature of Alice Ennor to the indorsements. A sufficient foundation was laid. He testified that he was acquainted with her signature from seeing it attached to papers known to be signed by her.

The appellant's counsel contend that the court erred in refusing to give the appellant's sixth to sixteenth refused instructions, inclusive; but no cause is shown in their brief why it was error to refuse them, except as to the seventh to fourteenth inclusive. The theory of the eleventh instruction was that, if the note had been assigned by Alice Ennor to the appellant before it had become due, and had not been paid to him, then he must recover. The reason given for supposing this one good is that appellee was cut off from making his proposed defense, because it was attempting to show failure of consideration or want of consideration for the assignment, and that, it is insisted, can not be done under the general issue, and must be specially pleaded, citing *Sheldon v. Lewis*, 97 Ill. 640.

It is claimed in appellant's brief also that it was error to refuse the appellant's seventh, eighth and eleventh refused instructions, for the further reason that the maker can not question, in a suit against him by the assignee, what consideration the assignee paid for the note, as it does not concern the maker, citing *Edwards on Bills and Promissory Notes*, 250, and *Burnap v. Cook*, 32 Ill. 168. The law cited can not have any application when applied to facts in this case and to the defense set up. There appears to be a misapprehension as to the nature of the defense relied on. It is not that there was no consideration, or that there was a failure of consideration for the assignment, or that the assignment was void for want of consideration, or that the assignment did not transfer the legal title so that suit could be brought in the name of the appellant. It is admitted that the assignment is valid, so that suit may be brought in the name of appellant, provided there was an assignment in fact; but the defense is that the appellant was, and had been, a mere holder for collection, and not entitled to the same protection as to defenses against the note as an innocent purchaser before maturity for value. The conditions of his holding could be shown in order to let in the defense of payment and settlement made to and with the payee, and the rules above cited are not violated by admitting evidence showing in what capacity appellant held the note in connection with and as a part of the chain of defense. The notice was amply broad to admit it.

It is insisted that the fifteenth refused instruction asked for by appellant should have been given. This holds that, "if appellee, with the intention of dividing up a large sum of money between himself and his brother and E. L. Bedford, made the payment to Alice Ennor, as claimed by said defendant, then such payment to Alice is no payment of said note," etc.

This point seems to be much relied on, and a large part of the appellant's argument is taken up in trying to show the bad faith, improper conduct and fraudulent intentions of appellee, his brother and Bedford, as regards the fund in controversy. It is also attempted to show that appellee has failed to pay all that he ought to have done to Alice in the settlement of the

note; that he improperly retained \$1,700. As we view the matter these considerations are wholly immaterial, provided in reality the money due on the \$6,000 note was equitably due to Alice Ennor, and the appellant only held the note as her agent for collection. If Alice Ennor was defrauded by appellee it was no concern of his. She would be the proper person to bring him to account, and not the appellant. And it is presumable she will do so in some other proceeding, if she is not fully satisfied with the settlement. On the hypothesis that the note is hers, the appellant can not interfere. The evidence does not fully disclose and we need not inquire for what consideration appellee was allowed to retain the money he did. It follows, then, that instruction No. 15, offered by appellant, was properly refused.

As to the other refused instructions, as there is no error pointed out, we will not examine them, as we suppose if there had been any objection to refusing them it would have been shown what it was. It was not error to command and not advise the jury to find in favor of appellee on the hypothesis contained in his first and second instructions. We think that there was ample evidence on which to base appellee's third instruction. The appellee had a clear receipt and quittance as against the note from Alice. It was paid partly in money and partly in a deed for eighty acres of land. It was partly paid and partly accorded and was receipted for in full; and if she was the equitable owner, that was good as to appellant, and neither in this instruction nor the fourth could the jury be misled because the instruction used the word "pay" Alice Ennor, as claimed by the defendant, instead of "settled," as set out in the fifth. The fifth instruction given for appellee is proper, as we view the law.

The last objection made by appellant's counsel, that appellee can not set up the defense sought to be made for the reason that the will of Grace Ennor, mother of Alice, gave appellant "power and authority to control Alice Ennor's property during his lifetime," will be considered hereafter.

We have now considered all the appellant's objections concerning the giving, modifying and refusing instructions,

and the admission of evidence, and it now remains to be considered whether the evidence justifies the verdict. To this question we will now address ourselves. It will be observed that the appellant did not offer himself as a witness, and the only evidence he has to rely on to show that he was the owner of the note in his own right, is the fact that he deeded the land to appellee without any consideration being paid at the time, and that after the deed was made to appellee for the land, and the note given to Alice Ennor, he retained possession of the note and procured Alice to indorse the note to him, which last claim is hotly contested by appellee and Alice, and perhaps another fact, that about that time he was endeavoring to defeat the collection of the judgment owned by the Cleveland Iron Company. Out of these facts and circumstances appellant's counsel infer that he deeded the land to Alice, for the purpose of defeating the collection of this judgment. Against these facts and circumstances we have the following evidence:

1. Alice Ennor testified: "On September 18, 1882, my father had everything in his own hands and did as he had a mind to with all the property my mother left me. This land was bought with money my mother left me. He came over and got me to sign the deed to Mr. Hodson; said it was better to sell it than to pay taxes. I paid the taxes that year, which was \$49.50."

2. M. Y. Johnson was produced as a witness on the part of appellee, and testified as follows: "I know plaintiff; was attorney for the Cleveland Iron Company against him. I recollect of his testifying in February, 1882, in regard to the lands in Wisconsin in controversy in this suit. It was in that proceeding where Mr. Ennor was praying to be discharged from arrest in an insolvency proceeding. He testified he was the agent of Alice Ennor; that she received some \$8,000 from her mother's will; that \$4,000 of the money was in his hands as agent for Alice; that he had a mortgage on this land; that the interest was not paid and he foreclosed it; when it was sold by the sheriff he and some other gentlemen went out there and he bid it off for Alice Ennor, but the sheriff misunderstood and

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struck it off in his name, and the deed was made out to him, and he immediately transferred the deed to Alice Ennor; that is the substance of it," etc.

3. In addition to this, the will of Grace Ennor, the mother, was introduced in evidence on the part of appellee, which showed that the testatrix gave "to Alice all personal property belonging to her, unconnected with her husband," in trust to Wm. Ennor, her husband, in trust for her daughter, Alice, for the purpose hereafter named; also moneys due from her husband, as follows: "All my personal property I give to my only child alive, Alice Ennor; all the furniture in the house; also, my gold watch, with all my clothes; also, the policy of insurance in the Northwestern Insurance Company, at Milwaukee, on my husband's life for ten years, if he lives," which insurance was made for her sole benefit. The will further created Wm. Ennor sole trustee for her daughter, Alice, to act and transact all her affairs during his natural life, without control of her husband, etc. The will was duly probated.

The above seems to be the substance of all the evidence on the question of the ownership. We think there is abundance of evidence from which the jury might properly find for the appellee and this question of the ownership of the note.

It will be seen as above stated that appellant did not go upon the witness stand to support his theory of the case or claim under oath that the land was his; indeed, he could not have done so without convicting himself of perjury committed either at the one time or the other. Would the appellant, without his oath denying his former testimony, and on no more evidence than appears in the record now, have us believe that he had committed perjury in such testimony?

But it is suggested that he can hold the note and collect it as the trustee of Alice. This seems to be the last resort to which appellant flies to make out a case. We think under the circumstances he should not be allowed to benefit by such claim as this. As to any trusteeship he may have had, we think he has placed himself in such antagonistic position to the trust that it must be regarded as having been repudiated. It is not shown that he has ever attempted to administer the

property as Alice's agent or trustee. He made the deed directly to her without reservation, and by that means placed the land entirely under her control, without regard to the trust, and he should not be allowed to reclaim it. He has also brought this suit in his own name without mention of any trust in the declaration, and claims the money as his own, and if it is collected will hold it as his own. Even in his brief here he strenuously insists that the note is his in his own right, thus repudiating his trusteeship; and in taking an antagonistic attitude to it, we think he can not claim the benefit of it. Alice now has the money, or a greater portion of it, in her own hands, and the deed of the eighty acres in her own name, and the result would be, if appellant succeeds, she would be compelled, under her indemnifying bond to appellee, to surrender it all to appellee, and appellee be compelled to hand it over to him. Seeing that appellant is claiming this fund as his own, we think the law would not sanction such an injustice.

Seeing no error in the record the judgment of the court below is affirmed.

Judgment affirmed.

C. B. SMITH, J., dissenting. This is a very remarkable case from the beginning to the ending, and justifies the truth of history, or poetry, or both, "that truth is stranger than fiction." I reluctantly dissent from the judgment of the majority of the court in this case, for whose judgment, learning and justice I have great respect, and so feel that it is due to them as well as myself and the parties to the suit, to give the grounds of my dissent. I shall do so with as much brevity as possible consistent with a correct statement of the case, and enough of its facts to make myself understood. Anything like a full or substantial statement of all the facts leading to, through and to the end of this suit would prolong this opinion far beyond what I intend or what is necessary to enable me to state intelligently the ground of my objection to the judgment. Appellant, William Ennor, is now an old man about eighty years of age and a widower. On August 20, 1874, his wife, then living, was sick, and expecting soon to die, made this will, viz:

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"I, Grace Ennor, wife of William Ennor, being sick and under the impression that I shall not recover, do this day assign over all personal property belonging to me unconnected with my said husband, in trust to Wm. Ennor, my said husband, in trust for my daughter, Alice Ennor, for the purpose hereinafter mentioned; also all moneys due me from my husband, which is as follows: All my personal property I give to my only child alive, Alice Ennor; all the furniture in the house; also my gold watch with all my clothes; also the policy of insurance in the Northwestern Insurance Company, at Milwaukee, Wisconsin, on my said husband's life, or for ten years, if he lives, which insurance was made for my sole benefit. Now I appoint my husband, Wm. Ennor, my sole trustee for my daughter, Alice Ennor, wife of Martin Ennor, at Apple River, to act and transact all her affairs during his natural life, without the control of her said husband, he not to have nothing to do in her affairs. All to be managed by William Ennor, my said husband, as long as he lives.

"GRACE ENNOR. [Seal.]"

This will is the source of all the property, both real and personal (including the note sued on), hereinafter mentioned.

This will makes Wm. Ennor the trustee, to have possession of and control the property in trust for his daughter as long as he lives.

In settling the estate of his wife, Wm. Ennor had judicial proceedings against certain parties to enforce the collection of debts due his wife, resulting in his buying at a judicial sale 160 acres of land in Wisconsin, on a foreclosure of a mortgage deeded to his wife, and taking the deed in his name, but without recital in the deed that he held in trust for his daughter.

Wm. Ennor, some time after this deed was made to him, became involved in litigation with the Cleveland Iron Company, and pending this controversy, conveyed this land to his daughter, Alice Ennor, but without any consideration in fact being paid to him for the land. While the land was then in his daughter's name, William Ennor proposed to Thomas H. Hodson to sell him the land and cut it up in ten acre lots and

sell it separately, and thus be able to realize better prices. After some preliminary negotiations between Alice and her father and Hodson, it was determined to make the sale, and the deed was executed by Alice Ennor to Thos. H. Hodson, for the sum of \$6,000, and Hodson, then a young man without any property, or at least but little, gave his note payable to Alice Ennor for the \$6,000, but without any security of any kind. The land was divided and parts of it sold at a good price, and the money received by appellee Hodson. About this time The Cleveland Iron Company attached the land as the property of Wm. Ennor, but this attachment was finally defeated and needs no further notice.

Some time after the note of \$6,000 was made and delivered William Ennor claims that his daughter assigned the note to him; also, without any consideration in fact passing for such assignment. After the note became due William Ennor frequently demanded payment of Hodson, but was put off with one pretext or another until finally he flatly refused to pay the note, and told Ennor to sue on it, and that he would not get his money without suing.

After the land was conveyed to Thos. H. Hodson, he sold in one way or another, eighty acres, realizing the gross sum of \$4,110, and still had eighty acres of the land left.

Appellee refusing to pay the note, this suit was brought to enforce payment by William Ennor. The declaration declared on the note and its indorsement to the plaintiff in the usual manner. Defendant pleaded the general issue and a special plea denying the assignment, and gave notice that he would prove on the trial that plaintiff only held the note as agent for Alice Ennor, and that he paid and fully settled with Alice Ennor for the full amount of the note. On the trial William Ennor, plaintiff, and W. D. Ennor, son of Alice Ennor, both swear positively that Alice Ennor signed the indorsement with her own hand, and that they saw her sign it. Martin Ennor, the husband of Alice Ennor, swears that he thinks it is his wife's signature.

Alice Ennor testifies that she never indorsed the note and that it was not her signature. Princess Ennor testifies that

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she knew her mother's handwriting, and that the writing on the back of the note was not in her mother's handwriting.

The defendant, Thos. H. Hodson, testifies that he does not think the indorsement genuine; thinks it a forgery. This was all the evidence upon the question of the genuineness of the assignment. I think the proof in this case entirely fails to overcome the positive testimony of the witnesses, who swear that this woman signed the indorsement. But it was a material and vital question in the case, and called for accurate and correct instructions from the court.

Conceding all the equitable claims of Alice Ennor to the land and its proceeds, the note, it is clear, under the will of her mother in evidence, that the father was the legal custodian of all her property of every kind derived from her mother during his life, and that she did not have the right to take it out of his hands for any purpose. If he was abusing his trust, or squandering or wasting the estate, so as to forfeit his right to have the custody and control of this property, then the proper and only remedy was to go into a court of equity and have another trustee appointed. There is not one word of credible evidence in this case to show that William Ennor was abusing his trust, or was wasting the estate of his daughter, but, on the contrary, he was trying to possess himself of the money due on this note in strict compliance with the terms of the will. Alice Ennor and her accomplice were seeking to divest appellant of his right to control this estate without a shadow of right or authority.

The evidence to my mind is clear and conclusive beyond all reasonable doubt, that this man, Thos. H. Hodson, aided by his brother, deliberately set about to cheat appellant entirely out of this note, and to cheat Alice Ennor out of as much of it as it was possible to get her to submit to.

The defendant knew appellant held this note and was pressing him for collection, and that he claimed to be the legal and rightful owner of it by assignment, and yet, with this knowledge, he goes to Alice, who he knew did not have the note, and enters into a marvelous contract with her, getting her to release him from all responsibility on the note on payment to

her, as recited in the agreement, of a sum of \$3,442.43 in full payment of this note, and the conveyance to her of the remaining eighty acre tract of this land; and yet, in the face of this writing prepared by the defendant and his brother (who is described by defendant as his "attorney"), the defendant himself swears that Alice Ennor was only paid \$2,410, leaving in the hands of the defendant and his "attorney," who was his law partner in the office, the sum of \$1,700 for some purpose unexplained by the defendant in this record. If the note was in fact assigned to appellant, as he swears, then the fact that he was the legal and rightful custodian of it under the will was ample consideration for the assignment to him, and he could not be deprived of his right to recover on the note, by any defense setting up remote or ultimate equity in Alice Ennor to the note after the death of appellant. If he was entitled to the possession and control of the estate until his death, then there is no escaping the conclusion that he was entitled to possess himself of the proceeds of the land by note through the forms of law. On the trial below, there was no claim made in the evidence that William Ennor was acting as the agent of his daughter, but, on the contrary, he was charged with forgery in making the assignment on the note. Alice Ennor refused to call him her father and repudiated any right to act for her on his part. Under this state of the proof the plaintiff asked the court below to give the jury this instruction, as it would read without the words included in parenthesis:

"The jury are instructed by the court, that if you believe from the evidence, that the plaintiff is (both) the (legal and equitable) owner of the note in question, and was such owner within about a month after its date by assignment from Alice Ennor, and if you further believe from the evidence that no part of said note has been paid to the plaintiff, then you should find a verdict in favor of the plaintiff and assess his damages at whatever sum may appear due, as shown on the face of said note, notwithstanding you may believe from the evidence that the defendant has paid and settled with Alice Ennor for whatever sum she may have demanded in payment of said note."

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But the court refused to give the instruction as asked, but modified the sense by inserting the words "both" and "legal and equitable," included in the parenthesis, and then gave it.

This modification of the instruction not only made it positively erroneous, but, instead of it being an instruction for the plaintiff, became one for the defendant. The plaintiff had a right to have the instruction given if it contained a correct proposition of law, or, if not, to have it refused; or, if the court could so modify it as to state a correct rule of law in harmony with the plaintiff's theory of the case, then to do so; but it was unfair and unjust to the plaintiff to so modify his instruction as to make it directly in the teeth of what he claimed to the jury, and then give it as for the plaintiff, thus turning it into a weapon against him. But, aside from this, I know of no rule of law which requires the legal holder of commercial paper to prove that he is also the equitable owner, before he can recover, nor do I believe any such case or authority can be found; and yet the above instruction told the jury in effect that, notwithstanding the plaintiff was in fact the lawful and legal holder of this note by assignment, and thus had the legal title, still that was not enough; he must go further and prove that he was also the equitable owner of the note.

In *Burnap v. Cook*, 32 Ill. 168, the Supreme Court say: "In this case the legal title to the note vested in the plaintiff at the time this suit was instituted. It is not a question that effects the rights of these parties whether any or what consideration was paid for the note by plaintiff below. The equities between the defendant in error and his assignor do not concern the plaintiff in error."

This case also holds that the legal title is sufficient to entitle the plaintiff to recover, and that the defendant can have no concern about the equities as between the legal holder and his assignor. See also *Mobley v. Ryan*, 14 Ill. 51. Under the authority of these cases the modification of plaintiff's instruction was erroneous. But the court proceeds on an entirely different theory when instructing for the defendant, and gives these two instructions:

"The court instructs the jury that if they believe from the evidence that at the time the note in controversy in this suit was delivered to William Ennor he was acting as agent of Alice Ennor, and that the note in question was the property of Alice Ennor, and if they further believe from the evidence that at the time of the commencement of this suit said note was still in fact the property of Alice Ennor and subject to her control, and that, before the commencement of said suit, the defendant, Thomas H. Hodson, had settled with Alice Ennor to her satisfaction and paid her the full amount due on said note, then the jury should find the issues for the defendant."

"The court further instructs the jury that if they believe from the evidence in this case that Alice Ennor is the owner of the note in question, and that said William Ennor holds the same as her agent, and so held said note as such agent merely, and not in his own right, at the time the defendant paid said note to said Alice Ennor, if they believe from the evidence that the defendant did so pay the same to said Alice Ennor, as claimed by the defendant, that then the jury should find the issues for the defendant."

Besides adopting a different rule from the one given to the jury for plaintiff, these instructions are bad, because there is no evidence to support the assumption that defendant paid Alice Ennor the full amount of this note, nor is there any evidence or any claim below that appellant was acting as her agent. Both parties disclaimed any such theory.

This instruction was asked by the plaintiff and refused by the court:

"The court instructs the jury that if you believe from the evidence in this case that the note in question was assigned by Alice Ennor to the plaintiff before it was due, and that said note has not been paid to the plaintiff, then you' should find your verdict in favor of the plaintiff, even though it should appear from the evidence that the defendant Hodson settled with said Alice Ennor, and paid her money upon the note after it became due."

What the reason could be for refusing this instruction I am not able to comprehend. It was asked under the plaintiff's

Holloway v. Johnson.

theory that he was the owner of the note by assignment, and there was ample evidence in the record to support his theory. I think it was error to refuse the instruction: *Mobley v. Ryan*, 14 Ill. 51, *supra*. There was no other instruction given for plaintiff to take its place, but, on the contrary, many other instructions asked by plaintiff of a similar character, and stating correct principles of law, as I think, were refused by the court. In no instruction in the record was the plaintiff's theory of the case submitted to the jury, but, on the contrary, his own instructions were turned against him, and were thus made hostile to his position before the jury. Under the instructions the jury could only find for the defendant. I do not think the plaintiff has had a fair and just trial under the law in this case according to the due forms of law. I think the learned judge who tried the case has overlooked the rights of the plaintiff, and has unintentionally deprived him of the right of that trial by jury.

I think the judgment ought to be reversed and remanded.

ROBERT HOLLOWAY
V.
JACOB JOHNSON.

28	468
118	1245

Contract—Trial—Improper Remarks by Counsel—Evidence—Instructions.

1. Where a jury is improperly influenced by remarks, allusions, or comments outside of the evidence, made by counsel during the argument of a cause on trial, the verdict should be set aside.

2. In an action to recover a share of the earnings, and for the care of certain horses, this court declines to interfere with the verdict for the plaintiff, the evidence being sharply conflicting and there being no error in the instructions.

[Opinion filed December 8, 1888.]

APPEAL from the Circuit Court of Knox County; the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. KIRKPATRICK & ALEXANDER, for appellant.

Messrs. WILLIAMS, LAWRENCE & BANCROFT, for appellee.

UPTON, J. This action of assumpsit was commenced by appellee against appellant for money claimed to be due for plaintiff's share of the earnings of certain horses in the stud for the years 1883 and 1884, and the care for and feeding of the defendant's horses after the season of each of those years. The declaration contained the common counts only.

Pleas of the general issue and set-off were interposed. The issues were submitted to a jury in the court below, and a verdict for the plaintiff was rendered for the sum of \$1,000, to reverse which the case is brought to this court, and it is assigned for error:

1st. That the verdict is contrary to the evidence.

2d. Improper remarks of counsel in argument to the jury.

3d. The court refused to admit proper evidence.

4th. Plaintiff's first and third instructions were improper.

First. The evidence in this case is somewhat voluminous and sharply conflicting, and can not be reconciled. It would serve no useful purpose to examine the evidence in detail, or endeavor therefrom to determine for ourselves the facts of this contention. This was the peculiar province of the jury before whom the witnesses appeared and testified, and whose especial duty it was to ascertain the facts and merits of this controversy. Two juries, as the records of this court disclose, who saw the parties and their witnesses face to face, who must have noted their appearance on the stand, their intelligence, fairness, candor and knowledge of the facts to which they testified, or the lack of it, and could far better determine the facts as to the truth of the respective claims of the parties after so hearing the case, than it is possible for us to do, have rendered a similar verdict and in nearly the same amount. In view of the evidence in this record we are satisfied that if the facts were submitted to another jury the result would not be different.

While we might be better satisfied if the verdict had been for a less sum, or indeed have been given for the adverse

party, yet we can not say that this verdict upon the facts in the record before us is so manifestly against the evidence as to require or warrant a reversal of the judgment of the court below.

Second. The appellant complains of improper remarks by counsel for appellee made to the jury in the argument of the case below. The remark was: "Col. Holloway did not get his title by any services rendered in the Union army during the late war." Remarks, allusions, or comments by counsel to the jury outside the evidence in the argument of a cause on trial before them, are wholly improper and eminently unprofessional. It is, however, too true, as all who have practiced our profession know from experience, that in forensic discussion upon hotly contested questions of fact before court or jury, zeal often outruns discretion, and duty and professional propriety are lost sight of, or are wholly disregarded. When this is done and the jury are improperly influenced thereby, and this is apparent, the verdict will be at once set aside. It is apparent that no general rule can be announced of professional conduct, but each case must be determined upon its particular facts.

If the verdict rendered appears to be the result of passion or prejudice, by whatever cause produced, it will and ought to be set aside.

We do not think, in view of the evidence in this record, that the verdict of the jury was in whole or in part the result of passion or prejudice, or that the remark complained of, which was perhaps uncalled for and unprofessional, contributed to the result.

Third. As to the refusal of the court to admit proper evidence we find no error; we think the court ruled correctly, and even if erroneous it did not prejudice the defendant's rights.

Fourth. It is said the first and third instructions given for the plaintiff were erroneous and several specific reasons are assigned in argument to establish that proposition.

We have carefully examined the instructions given in this case, and we are satisfied that the court below did not commit

an error in giving to the jury the instructions complained of; that the instructions given on the part of the plaintiff in connection with those given on the part of the defendant as a series, were correct as to the law applicable to this case; and finding no substantial error in this record, the judgment of the court below must be affirmed.

Judgment affirmed.

ALEXANDER MCARTHUR

V.

ISAAC ARTZ.

Criminal Law—Misdemeanor—Appeal—Costs—Dissenting Opinion.

Where the defendant prosecutes an appeal to the Circuit Court from a conviction before a justice in a prosecution for a misdemeanor, he can not be required to advance the fees of the clerk of the Circuit Court for docketing the cause.

[Opinion filed December 13, 1888.]

APPEAL from the Circuit Court of Mercer County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. S. D. C. HAYS, for appellant.

The general principle on the subject of costs is that the party who requires an officer to perform services, for which compensation is allowed, is, in the first instance, liable therefor. In legal contemplation he pays costs as they accrue. He is liable to pay them to the officer unless our statute expressly excepts his case from the operation of the general rule, and in a criminal case, a defendant, even when successful, is liable to pay his costs to the proper officer, when the costs accrue, by reason of an appeal taken by him. Neither does the ninth section of Article II of the Constitution exempt the defendant in a criminal prosecution from liability for costs.

McArthur v. Artz.

The People ex rel. v. Harlow, 29 Ill. 43; Carpenter v. The People, 3 Gilm. 147.

“A judgment before a justice of the peace is final unless the law gives an appeal. The Circuit Courts have no inherent power to try appeals from inferior tribunals, and can only entertain them by virtue of statutory power.” Skinner v. The Lake View Avenue Co., 57 Ill. 551.

Messrs. PEPPER & SCOTT, for appellee.

UPTON, J. This was a criminal prosecution for misdemeanor, commenced by the people against appellee, before a justice of the peace of Mercer county, on two complaints, upon which two State warrants were issued, and upon which appellee was arrested. Upon one of which, on hearing before said justice, the appellee was convicted, and upon hearing on the other was adjudged to pay the costs; from both of which said judgments an appeal was taken to the Circuit Court of Mercer county, under the statute granting appeals in such cases.

The appellant, clerk of that court, refusing to enter on the docket of such court the proceedings so appealed, without the payment of the fees allowed by the statute to clerks of circuit courts in this State for the docketing of causes in civil cases on appeal, and the appellee refusing to pay in advance therefor, a rule was obtained, on motion of appellee, from the Mercer Circuit Court, requiring the clerk to enter such appealed cases upon the docket of that court without the payment of his fees therefor in advance; from which judgment and order of the court the clerk appealed to this court.

By the errors assigned upon this record the only question presented is the liability of the appellee to pay the clerk's fees in advance, or as the same may accrue in proceedings of this character when brought by appeal from a justice's court.

We think the Constitution and the legislative enactments pursuant thereto have exempted appellee from the payment of such costs in advance.

The 19th section of the Bill of Rights in the Constitution of 1870 declares “that every person ought to obtain by law.

right and justice freely, and without being obliged to purchase it," etc.

In prosecutions of the character here in question, appeals by law are allowed from the justices' judgments to the Circuit Court of the county in which such proceedings are had.

The evident design of the above provision of the Constitution was to secure to every person prosecuted for a criminal offense—who by law, before conviction are presumed innocent of the act charged—every just facility for a fair trial, and that such person should have the means of making his defense to such charge, whether he was of a sufficient pecuniary ability to pay therefor or not.

To withhold from such person the means of making such defense in the method allowed by law, whether by refusing process to enforce the attendance of witnesses to repel charges of guilt, or in cases where proceedings are commenced before a justice of the peace, in refusing, on appeal, to place upon the docket of such appellate court such appeal—without which a re-trial of the charge could not be had—until the person so charged should pay the docket fees to the clerk of such appellate court therefor, would, in our judgment, be a manifest violation of the letter and spirit of the Constitution, before cited.

This becomes, in our judgment, the more apparent when it is considered that the judgment in the justice court, in cases of the character here in question, may subject the appellee to imprisonment in the county jail not exceeding one year. That by the appeal, as provided by law, the judgment in the justice court is vacated, and a trial *de novo* is given to the condemned party, appellant in the Circuit Court.

This is a substantial and important right granted to such person by the law of the State. In this rightful endeavor to obtain justice in the matter of such prosecution, and before such person can be lawfully condemned or punished, whether in person or property, for an alleged violation of law, he should and ought to be allowed the right of trial as to the truth and justice of the charges alleged against him, in the several courts of the State wherein, by law, the subject-matter

thereof is cognizable, whether such courts are of original or appellate jurisdiction, and that, too, without the payment of fees in advance to the officers of such courts, or, in the language of the Constitution, "without purchasing that justice."

By the appeal the two causes so adjudged against appellee were in the Circuit Court, and he had the same right to prosecute his appeals in that court as he would have had in the case of an indictment in the Circuit Court, and, in our judgment, the appellant might as well require the payment of fees in advance of issuing subpoenas for appellee's witnesses on the trial of said appeal after the same had been placed upon the docket of the Circuit Court, as to require docket fees in advance for the docketing of appellee's appeal from the justice.

It was in consonance with the same spirit of justice which prompted the insertion of the provision of the Constitution before cited, that the Legislature saw fit to exempt innocent parties who are wrongfully prosecuted for criminal offenses, from the payment of all costs, and to throw the entire burden of the defense as well as the prosecution upon the several counties of the State wherein proceedings are commenced.

The 17th section of Chap. 33, Starr & Curtis, title, Costs, prescribes that if, in any case of the people, the charge is not made out, or proved, or when verdict is rendered against the plaintiff, the defendant shall recover no costs.

If the defendant can not recover costs when discharged or acquitted, and be compelled to advance or pay costs which he can in no event recover, would it not be manifestly a purchase of justice without consideration even?

Sec. 444 of Chap. 33, *supra*, also provides that the defendant, in proceedings of the character here in question before the justice of the peace, may have the truth of the charges against him tried by a jury in like manner as in civil cases, but the defendant is not required to advance the fees therefor as in civil cases before justices of the peace.

Sec. 15 of Chap. 53, R. S., title, Fees and Salaries, provides, that in all criminal cases where the defendant shall be acquitted, all the costs (including clerk's fees), shall be paid from the county treasury.

The intent of the Legislature doubtless was that an acquittal or other legal discharge absolved the defendant from any and all liability to pay costs, including clerk's fees, but instead thereof the clerk's fees were to be paid by the county, and to obtain such acquittal appellant was entitled of right to the consideration and judgment of all the courts of the State having jurisdiction of such proceedings, whether original or appellate, without the payment in advance of the costs therefor. *Wells v. McCulloch*, 13 Ill. 606; *Carpenter v. The People*, 3 Gilm., 147.

It is the opinion of this court that the Circuit Court decided properly in sustaining appellee's motion and in directing the appellant to enter upon the docket of such court the appeals in the record mentioned, without the payment to appellant of fees in advance therefor, and seeing no error in the record of proceedings below, the judgment is affirmed.

Judgment affirmed.

C. B. SMITH, J., dissenting. I am not able to concur with either the argument or the conclusion of the majority of the court in the foregoing opinion. If the principle involved was not of grave importance in the administration of criminal jurisprudence, I should content myself with a simple dissent; but regarding the opinion and judgment of the majority of the court as fraught with the gravest consequences, and imposing burdens upon the people in criminal prosecutions never contemplated by either the Constitution or the law framed under it, I feel it my duty to give my reasons for disagreeing with the majority of the court.

The record in this case discloses the fact that Isaac Artz, appellee, had been duly convicted according to law, upon two charges of misdemeanors, before a justice of the peace, upon a trial had, and that final judgment had been entered against Artz before the justice.

The justice had jurisdiction of the offenses charged and nothing is suggested in the record that he did not proceed according to the forms of law, nor is anything suggested that the defendant did not have allowed to him all the privileges

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he was entitled to under the law. In'short, he had a trial on a criminal charge before a court having original jurisdiction and was duly convicted and judgment of conviction rendered against him.

From this final judgment he prayed an appeal to the Circuit Court, as he had the right to do, and when he requested the clerk to docket the transcript, the clerk demanded his fees before docketing, which appellee refused to pay, and a rule of court was entered compelling appellant to docket the cases without being paid his legal fees therefor, from which order the clerk appeals to this court.

I hold that, after appellee had been once convicted before a justice of the peace, he had then had his trial contemplated by the law, and that the judgment of the justice was just as final and binding on the defendant as it would be before the Circuit Court, until appealed from. So long as that judgment stood against him he was not in the attitude of an innocent person. He was already convicted of a criminal offense. The Constitution and all the statutes quoted in the opinion of the majority of the court, relating to the rights of persons charged with crime, to have justice "freely" administered to them, and to have counsel assigned them, and to have process free and the services of the officers free, relate to a time anterior to the judgment of conviction. It relates to the trial and to the proceedings leading to the trial. A trial in the first instance upon a criminal charge, to ascertain the guilt or innocence of the accused, is a very different thing from an effort to obtain an appeal from a judgment of conviction. After he has had a trial and been found guilty, his right to perfect an appeal at the expense of the officers of the court, or the people, ceases, and he must then pay his own way, certainly to the extent of perfecting his appeal to the Circuit Court, and other superior courts. What his rights might be on a trial *de novo* after he had perfected his appeal and got it in the Circuit Court, is not involved in this controversy, and I express no opinion upon it. The Supreme Court has expressly recognized this distinction in the case of *Carpenter v. The People*, 3 Gilm. 147.

The facts in that case were only different from the one at bar in this, that here the appeal was from a justice of the peace to the Circuit Court, and in that case the appeal was from the Circuit to the Supreme Court.

Carpenter sued out a writ of error to the Circuit Court and made a bill of costs in prosecuting his suit, and in the Supreme Court procured a reversal of the judgment. The clerk of the Supreme Court issued a fee bill against Carpenter for the costs he had made, and Carpenter entered a motion to quash the fee bill, insisting that he was not liable for costs in a criminal case, and quoted to the attentive ears of the Supreme Court the language of the Constitution, and the various enactments of the Legislature supposed to relieve criminals or supposed criminals of this State from the burden of paying costs in the various courts of the State, in their efforts to elude the ends of justice and escape convictions had against them in the trial courts, but the court denied the motion and held Carpenter liable to pay the costs he himself had made. Judge Treat in his opinion uses this language: "The general principle on the subject of costs is that the party who requires an officer to perform services for which compensation is allowed, is in the first instance liable therefor. In legal contemplation he pays the costs as they accrue. On this ground the successful party in civil actions recovers a judgment for his costs. The only difference between a civil and criminal case is that the successful defendant in the latter is not entitled to a judgment against the State for his costs. He is nevertheless liable to pay them to the officer unless our statute excepts his case from the operation of the general rule. There are some special provisions of the statute relative to the fees of the clerks of the Circuit Courts and sheriffs in cases where the defendant is acquitted, but there are none which apply to the fees of the officers of this court in such cases.

"The ninth section of the eighth article of the Constitution does not exempt the defendant in a criminal prosecution from liability for costs. It is the opinion of the court that Carpenter is liable for all the costs made by him in the prosecution of his writ of error."

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The question again came before the court in the People ex rel. Maus v. Harlow, 29 Ill. 43. In that case Mr. Chief Justice Caton said: "So far as we are advised it has been uniformly held both by the Supreme and Circuit Courts that the clerks may insist on their fees as their services are performed, and this we have no doubt is the law."

These two cases seem to me to be conclusive upon the point involved in favor of appellant. I have been unable to find any subsequent decision which in the slightest degree militates against the full force of these cases.

There is not only no statute relieving the appellee from the payment of these fees, but on the contrary there is a positive statute requiring him to do so.

Sec. 389, Chap. 38, R. S. 1887, provides: "The defendant may appeal from the judgment of the justice of the peace, in criminal cases, to the Circuit Court of the county, the appeal to be taken in the same time and manner and upon the same conditions and with like effect and like proceedings had thereon as in civil cases, except that no damage shall be allowed."

Now there can be, and is no claim, that if the case had been a civil one the defendant would have been compelled to pay all costs as they accrued, and the above section declares that defendants in criminal cases *shall* do the same thing.

Sec. 19 of the Bill of Rights of our Constitution, which provides that "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay," which is relied on in the opinion of the majority of the court as justifying the defendant in prosecuting his appeal without costs to himself, I insist has no relation to the case, and can have none. The section of the Constitution quoted is broad and sweeping in its terms, and applies as well to civil as criminal proceedings, making no reference to either; and it is just as applicable in its florid and flamboyant provisions to civil as to criminal proceedings, and yet no one ever dreamed that he could go into a court with a civil case, and

have justice "freely" administered to him, even under the broad mantle of the above clause of our Constitution.

If the defendant in this case had the legal right to have the clerk docket these cases for him without charge, then that right must be placed on the broad ground that it is placed upon by the majority of the court, under the provisions of the Constitution above quoted, that he shall obtain justice "freely," and the same rule of exemption will exempt not only him, but every person ever convicted of high or low crimes in this State; and he may prosecute his appeals and writs of error from the lowest to the highest court in this State at the expense of the State and the officers of the courts. Suppose he is convicted in the Circuit Court; the judgment is no more final than it was before the justice, and no more effective to punish him. He has a right to a writ of error from the Supreme Court and to have the record transferred to that court.

If he has the right to the services of the clerk to docket his transcript, at a cost of perhaps fifty cents, free, he has precisely the same right to demand of the clerk a transcript of the record free with which to go to the Supreme Court, without reference to the size of the record or the amount it would cost the clerk to prepare it, and by the same right compel the clerk of the Supreme Court to docket his case and issue the necessary process free of charge, notwithstanding the rule of the Supreme Court requiring a docket fee.

But this claim has been expressly denied in *Carpenter v. The People*, 3 Gilm. 147, *supra*. Such a rule or such a claim of right to the services of the clerks of courts free, by convicted criminals in search of appeals and writs of error, after conviction, would involve, in many important criminal cases, most serious and ruinous consequences upon clerks. The convicted anarchists of Chicago might have said with the same propriety and the same legal right, to the clerk of the Criminal Court of Cook County, that they required the record of their trial, containing many thousand pages, transcribed free of all expense to them, which the defendant in this case required of the clerk below—that his services must be rendered free. The difference is only in the magnitude of the work, and not in the principle involved.

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Nor does the fact that the trial and conviction was had in different courts make any difference in principle, for the incredible logic of the contention of the defendant is, that he is exempt everywhere from liability for costs in a criminal proceeding against him. The mere circumstance that he is in one court or the other has no significance, nor does the constitutional provision above quoted and relied on by the majority of the court, make any distinction as to time, place or circumstances, to which the "*free*" administration of justice shall be limited.

There is no provision in the Constitution or any of the statutes, that a person convicted of a criminal charge shall have the services of officers free in one court, but that he shall pay for them in another. If he is protected in one court, then in all, and if not in all, then in none, except in cases *before* conviction, where positive and affirmative enactments relieve him from costs; but this case is not within that exception.

The case of Wells v. McCullough, 13 Ill. 606, cited by the majority of the court in support of the judgment, I hold, has no reference to the case at bar, either in its facts or legal application, and does not support the judgment of the court.

The trial in that case was had on an original indictment, and the costs accrued in the progress of the trial before conviction, and the defendant was acquitted. The clerk of the court, after the trial was over, and after defendant was discharged, issued a fee bill against the defendant for costs made during the progress of the trial and in its preparation.

A motion was made to quash the fee bill, which was allowed. This ruling was held correct under the eighth section of Chap. 41, R. S., in which is this provision: "And in all criminal cases where the defendant shall be acquitted, or otherwise legally discharged without payment of costs, the clerk shall receive such compensation as the County Commissioners shall order, not exceeding \$30 per annum."

And in this same case the court refer to Carpenter v. The People, 3 Gilm. 147, and say there is no conflict between the cases, and re-affirmed the Carpenter case.

Had Wells been convicted, as was Artz in this case, and a final judgment passed against him, then the case would have been like the one at bar, and the opinion of the court the same as it was in Carpenter's case, *supra*.

For these reasons I am unable to concur with the majority of the court and think the judgment ought to be reversed.

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V.

JOHN CORRIGAN.

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74	99
28	476
178	121

Water Crafts—Statute—Collision—Ownership of Canal Boat—Jurisdiction—Admiralty.

1. A proceeding under the "Water Craft Act," though in many of its features like a proceeding *in rem* in admiralty, is not within the exclusive jurisdiction of the Federal courts, the remedy being one which a common law court is competent to give, and the result reached being a judgment *in personam*.

2. In the case presented, the jury were warranted in finding the appellee to have been the owner of a canal boat, which was sunk in a collision.

[Opinion filed December 13, 1888.]

APPEAL from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding.

Messrs. C. E. KREMER and C. W. BROWN, for appellants.

Messrs. DUNCAN, O'CONOR & GILBERT, and HALEY & O'DONNELL, for appellee.

UPTON, J. This is a proceeding instituted by John Corrigan, appellee, against the steam canal boat, "Nunnemacher," pursuant to Chapter 12 of the Revised Statutes of Illinois, commonly known as the "Water Craft Act."

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The cause of action alleged in the petition arose from a collision of the steam canal boat "Nunnemacher," of above fifty tons burden, owned by the Illinois and Michigan Canal Company, a corporation organized and doing business in the State of Illinois under and in pursuance of the laws thereof, of which corporation the said George A. Gindele is an officer, manager of its business, and a shareholder therein, and the canal boat "Midnight," then belonging to John Corrigan, the appellee, and being of above five tons burden, the steam canal boat "Nunnemacher" and the canal boat "Midnight" being at the time of such collision domestic vessels and water craft, and both engaged in commerce wholly within the borders of the State of Illinois, and the home port of both being within this State, and enrolled and licensed pursuant to law.

In the night time of the 8th of May, 1886, the canal boat "Midnight," in charge of William Peck, as master, being towed by mules, was on its way from the city of Chicago to Peru, in La Salle county, on the waters of the Illinois and Michigan canal, and within the State of Illinois, laden with a cargo of hard coal screenings. Near Lamont, in Will county, in the State of Illinois, she was overtaken "en route" and run into by the steam canal boat "Nunnemacher," broken open in keel and side, sunk, and rendered a total loss, without fault on the part of the canal boat "Midnight," her officers or crew, and through the negligence and want of care of the officers and persons in charge of the steam canal boat "Nunnemacher," as is alleged in the petition.

On the 14th day of May, 1886, Corrigan, the appellee, sued out of the Circuit Court of Will county a writ of attachment under the provisions of the "Water Craft Act," against the steam canal boat "Nunnemacher," alleging in his petition that the owners of the steam canal boat were unknown.

The writ was issued on that day pursuant to the provisions of such act, and the boat was seized under the writ by the sheriff of Will county. Five or six days thereafter, John A. Gindele, claiming an interest as part owner in the steam canal

boat, bonded and released the boat from such seizure under Secs. 15 and 17 of said Chap. 12, R. S. (being the Water Craft Act), his sureties being John Angus and George P. Adams, the appellants, and thereupon a writ of restitution was issued, and returned by the sheriff of Will county, executed pursuant to the 17th section of the aforementioned act, and the said steam canal boat was thereupon discharged and released from the lien of such attachment, as provided in the attachment act.

Some time after such restitution, George A. Gindele, one of the appellants, entered his appearance in such attachment proceedings, filed his answer thereto, claiming to be interested in the steam canal boat as part owner thereof, and as principal in the bond given and filed in that court to obtain the release of the boat from such attachment seizure, therein admitting the collision at the time, place, and with the results charged in such petition for the attachment, but denying that it was caused by the negligence or want of care or skill on the part of those in charge of the steam canal boat "Nunnemacher," or that the canal boat or her owners were liable therefor.

This answer was subsequently withdrawn, by leave of court, and appellants were allowed to enter a motion to dismiss the proceedings for want of jurisdiction in the trial court; and thereupon, on leave obtained, Corrigan, appellee, amended his petition, which, being re-filed, the motion to dismiss for want of jurisdiction was again interposed, which motion being overruled, a replication was filed to the answer, and the cause submitted to a jury for trial, who, after hearing the evidence, returned a verdict for the appellee for \$1,000. A motion was made for a new trial and overruled. Judgment was entered on the verdict, and the case is brought to this court on appeal, and errors are assigned upon the record, by which is presented for our determination two questions:

First. Had the trial court jurisdiction of the subject-matter involved in the proceeding?

Second. Were the jury justified from the facts and circumstances in evidence before the trial court, in finding the appellee, Corrigan, the owner of the canal boat "Midnight?"

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We will consider these questions in the inverse order of their statement, and examine the second proposition first.

It will be apparent, on a careful examination of this record, that the trial in the court below proceeded upon the theory, conceded by both appellant and appellee, that the canal boat "Midnight" was in fact owned by appellee, John Corrigan. No questions specifically upon that point seem to have been made upon the trial.

George A. Gindele, one of the appellants who was sworn upon the trial, in speaking of the trade or business in which the "Midnight" was engaged at the time of its loss, speaks of it as "Corrigan's boat." He further states "that he requested Corrigan to remove the sunken wreck of the 'Midnight' after the collision, but that Corrigan refused and abandoned her."

John Corrigan, appellee, in his testimony swears, "that less than one year before the collision, he caused the 'Midnight' to be repaired, or put repairs on her, to the amount of \$520 and more; that he kept her in good repair all the time by putting repairs upon her from time to time, the season of her loss, and that she was in good repair at the time she was sunk by the collision." He says, "She was worth \$1,000 and more, at the time of the collision, and I would not have taken \$1,000 for her." He also says, "William Peck had charge of the boat." He further states the rates he was receiving per ton for freight carried on the boat at the time of her loss by the collision, and the amount of freight it would have earned for him on the voyage in which her loss occurred, but for such collision, after paying her tolls and the wages of her men.

It seems to us that appellants' instructions to the jury, and the special findings submitted by them to the jury, manifestly assume the ownership of the canal boat "Midnight" to have been in the appellee, and we think under all the facts and circumstances in evidence in the case, the jury were fully warranted in so finding the appellee to have been the owner at the time of the collision, and that the court below committed no error in rendering judgment on the verdict, so far as that question is involved.

The important question involved in this case, however, is, had the court below jurisdiction of the subject-matter herein involved?

It must be conceded that the proceedings in the Circuit Court were in strict conformity to, and within the provisions of, the statute entitled, "Attachment of Water Craft," Chap. 12, R. S. 1874, both in form and substance.

No challenge is made, in the discussion before us, of improper rulings of the court upon the trial, except as before stated, either as to the evidence, or the giving of or refusal of instructions to the jury.

It is strenuously insisted, however, by the learned counsel for the appellants, that the collision complained of in the case at bar, and the consequent loss of the canal boat "Midnight," is a *maritime tort*, and consequently is within the original and exclusive jurisdiction of a court of admiralty by virtue of the act of Congress of 1789, and that, wherein the District Courts of the United States have original cognizance of admiralty causes by virtue of that act, such cognizance is exclusive, and that no other court, State or National, can exercise it, with the exception always of such concurrent remedies as are given by the common law. To maintain that position our attention is directed to several cases determined in the Federal courts wherein this question seems to have been discussed, and the contention of appellants' counsel sustained, either in whole or part, but which, in the view we take of the case, we do not feel called upon carefully to consider or discuss. Whatever opinion we might entertain upon that contention, if it could be regarded as an open question in this State, and we were permitted its examination and determination, regardless of the judgment and authoritative decisions of the court of last resort in this State, is as unnecessary as it would be useless to express.

We shall content ourselves, therefore, with a brief examination of a few of the several decisions of the Supreme Court of this State upon the question; further investigation could serve no useful purpose.

We may premise, that a tort is defined to be an injury or wrong committed with or without force to the person or the

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property of another, real or personal, in possession or remainder, and that such injury may arise by either the non-feasance, malfeasance or misfeasance of the wrong-doer.

In the case of *Loy v. Steamboat Aubury*, 28 Ill. 412, which was an action of trespass brought in the La Salle Circuit Court against the steamboat for an assault and battery committed by the mate of the steamboat upon the plaintiff while he was a passenger upon the boat, which action was brought and prosecuted under and pursuant to the act of February 16, 1857, the title of which was to amend Chap. 102, R. S., entitled "Steamboats," and known as "The Water Craft Act," and was substantially the same as the one now in force, so far as the question now being considered is involved. In that case was presented, says Judge Breese writing for the court, this question: Can an action of trespass be maintained against a steamboat for an assault and battery committed by the mate of a boat upon the person of a passenger on board, while such boat is navigating the rivers within or bordering upon this State?

After a careful examination that court held that it could be maintained under the "Water Craft Act," then in force and before cited, and directed the entry of judgment for the plaintiff in the Circuit Court, citing in support of that opinion, *Steamboat Champion v. Jansen*, 16 Ohio, 91; *Canalboat Huron v. Simmons*, 11 Ohio, 458.

The predicates of the case in 28 Ill., *supra*, and those cited therein from Ohio, were clearly *maritime torts* and the proceedings were instituted and prosecuted under and in pursuance of the enactments of the Legislature directly against the vessel, as in the case at bar.

We see no reasonable distinction in those cases from the one before us, upon the question of State jurisdiction of *maritime torts*; indeed it seems to us that, if distinction there can be, it is in favor of the appellee, for in the case at bar the personal bond of the appellant was substituted for the boat, which was released and discharged from the seizure when bonded, and thereafter the case proceeded to final judgment as a proceeding *in personam*, in pursuance of the provisions

of the "Water Craft Act," the lien created by the statute upon the boat being discharged by the voluntary act of appellants, and the bond of the appellants substituted therefor.

In *Johnson v. The Chicago and Pacific Elevator Co.*, 119 U. S. 388, that court used the following language: "Liens under State statutes, in suits *in personam*, are of every-day occurrence, and may extend to liens on vessels when the proceedings to enforce them do not amount to admiralty proceedings *in rem*, or otherwise conflict with the Constitution of the United States. There is no more valid objection to the attachment proceedings to enforce the lien in a suit *in personam* by holding the vessel by *mesne* process, to be subjected to execution on the personal judgment when recovered, than there is in subjecting her to seizure on execution. Both are incidents of a common law remedy which a court of common law is competent to give."

The doctrine here announced lends force to the argument of the appellee's counsel, that the mere fact that the water craft attachment act authorizes the seizure of a vessel by attachment on *mesne* process, and that such attachment was for a maritime tort, does not alone oust the State courts of jurisdiction, so long as the remedy adopted is one competent at common law, and the result reached is a judgment *in personam*.

It could not be successfully maintained that appellee might not have brought his common law action, in trespass or case, against the owner of the steam canal boat "Nunnemacher," and have recovered a judgment against such owner, and seized the boat upon execution in satisfaction of such judgment.

By the 21st section of the "Water Craft Act," it is provided that when the vessel seized upon *mesne* process issued on the petition and bond filed, is released by the bond of the owner of the vessel, or person interested therein, being filed in the court wherein such proceedings are pending, the bond stands by substitution in the place of the vessel. The bondsmen are before the court by their voluntary act, and the only judgment which can be rendered is, and must be, *in personam*.

This section also expressly provides that all proceedings subsequent to the giving the bond shall be the same as is now

McEniry v. Town of Canoe Creek.

provided by law in actions *in personam* in courts of record in this State. In *The Moses Taylor*, 4 Wall. 427, it was held the distinguishing and characteristic feature of a suit in admiralty is that the vessel or thing proceeded against itself is seized, impleaded and held as the defendant, and is judged and sentenced accordingly.

In *The Lottawana*, 21 Wall. 558, the Federal court denies the State court's admiralty jurisdiction of a proceeding purely *in rem*, in which all must agree, but concedes, as we think all must, the right to proceed by common law remedy, or such remedies as are equivalent thereto.

In *Langdon v. Wilcox*, 107 Ill. 606, in concluding their opinion the court say: "A proceeding under the 'Water Craft Act' is essentially, in many of its features, like a proceeding *in rem* in admiralty, though differing from the latter, it is believed, sufficiently to avoid any conflict with the Constitution of the United States, which gives to the Federal courts exclusive jurisdiction in admiralty."

This jurisdiction of the State courts has been challenged many times under statutes similar to the one here in question, before the Supreme Court of this State, and that jurisdiction has in every instance, so far as we are advised, been sustained and upheld, the citation of which cases is not deemed necessary. In view of which we are constrained to hold, in the case at bar, that the court below had jurisdiction thereof, and finding no error in the record, the judgment of the Circuit Court must be affirmed.

Judgment affirmed.

JOHN McENIRY ET AL.

V.

TOWN OF CANOE CREEK.

Highways—Ditch as Obstruction—Proceeding by Town to Recover Penalty—Instruction to Find Defendants Guilty.

In a proceeding by a town to recover a penalty for obstructing a highway by digging a ditch therein, the court below improperly directed the jury to find the defendants guilty, there being no evidence fairly tending to prove one of them guilty.

[Opinion filed December 19, 1888.]

APPEAL from the County Court of Rock Island County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. McENIRY & McENIRY and SWEENEY & WALKER, for appellants.

Messrs. W. H. ALLEN and M. M. STURGEON, for appellees.

Per Curiam. This case is brought here on appeal by appellants and the judgment of the court below is sought to be reversed on various grounds. The appellants were convicted below for digging a ditch in a public highway and "washing" the roadway with water. This case was before this court at a former term on appeal of the Town of Canoe Creek, and is reported in 23 Ill. App. 267. The judgment was reversed for an error in an instruction, though on the merits of the case the court held the defendants liable, upon proper proof of their digging the ditch. The case was again tried and on the trial the court directed the jury to find all three of the defendants guilty, and the jury rendered a verdict accordingly and fined the defendants three dollars. The defendants, at the time, excepted to this instruction. Judgment was rendered against all the defendants by the court after overruling a motion for a new trial. Defendants now bring the case here and allege, among other things, that the court erred in directing the jury to find the defendants guilty. In this we think there was error. There was, in fact, no evidence showing or fairly tending to show that William McEniry had anything to do with digging the ditch or throwing water on the road. All the evidence that tends to implicate him was the statements of one or two witnesses that they heard one or both his brothers swear, on a former trial, that "we did it," and the

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further fact that Wm. McEniry did not go on the witness stand and deny it. This proof is wholly insufficient to commit him. But, even if the proof fairly tended to show his guilt, and was of such a character that he might have been convicted upon it, still, he had a right to have the jury pass upon his guilt or innocence as a question of fact, and it was error for the court to deprive him of this right.

We see no other error in this record. The questions pressed upon our attention by appellants are not other or different from what they were when the case was before us before, and we see no reason for changing the views then expressed in our published opinion.

For the error suggested above the judgment is reversed and the cause remanded.

Reversed and remanded.

LOCEY COAL MINES

V.

THE CHICAGO, WILMINGTON AND VERMILLION COAL CO.

Mines—Creditor's Bill—Receiver—Order for Sale of Property—Sale without Redemption—Statute—Priority of Claims—Receiver's Certificates—Practice—Oppression.

1. The statute reserving the right to redeem real property sold under execution, decree of foreclosure, or to enforce a lien, has no application to an order for the sale of realty held as assets by a receiver appointed by the court by consent of both parties, in proceedings under a creditor's bill, such sale being to secure funds with which to discharge mortgage incumbrances, receiver's certificates and other claims against the owner.

2. The plaintiff in error can not complain of an error which has not injured him, although it may have injured one who has not joined in the writ of error.

3. In the case presented, the finding of the master as to the value of the property was but of slight importance, as it can neither affect the indebtedness nor the amount of the sale.

4. The law does not regard the legal enforcement of a contract as oppression, although it may result in the sacrifice of the defendant's property.

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[Opinion filed December 19, 1888.]

IN ERROR to the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding.

Mr. HENRY S. MONROE, for plaintiff in error.

Mr. GEORGE S. HOUSE, for defendant in error.

Per Curiam. This was an original creditor's bill filed by the defendant in error against the plaintiff in error. The plaintiff in error was a corporation organized under the laws of Illinois for the purpose of carrying on the business of mining and selling coal. The property of the plaintiff in error consisted of 280 and 30-100 acres of land in Bureau County, Illinois, in which it had an equitable interest, and also coal rights under 211 71-100 acres of land adjoining, together with mining shaft, air shaft, tipple house, thirty miners' houses, steam-engine, boiler, hoisting apparatus, machinery, pumps, cars, tracks, screens, pit and car scales, loading dock, boat, steam tug, etc., necessary for carrying on the coal business. The defendant in error was the judgment creditor of plaintiff in error. Execution had been issued and returned "no property found." The bill showed the existence, besides the judgment, of a \$30,000 trust deed to Hinchman, and a mortgage to Lewis of \$1,800, both duly recorded; that the plaintiff in error was much embarrassed; that suits were being instituted, and showing that if the property could be preserved as a unit, it would be ample to pay all its debts, and praying for a receiver.

The receiver was accordingly appointed by consent of the parties herein, and afterward took possession of the property. Afterward, on petition of the receiver, he was empowered by the court to issue receiver's certificates and borrow \$10,000 for the purpose of operating the mine and paying amounts due the employes (\$7,992.11) and to make repairs. Upon the petition of the plaintiff in error, by order of court the receiver was permitted to buy, in the name of the corporation, 300 acres more of mining rights, March 9, 1887. This cost \$3,200. The

inventory of plaintiff in error showed goods in store to be of the value of \$1,915.31, mining property \$1,924, and boat \$332.40. Several claims were proven up against the plaintiff in error. On petition of defendant in error and consent of plaintiff in error, the receiver was afterward authorized by the court to borrow \$15,000 and issue receiver's certificates, and make improvements on the property, and the plaintiff in error deeded all the coal mine property, real and personal, to the receiver. Upon the petition of defendant in error the court ordered the sale of all the property of the plaintiff in error vested in the receiver, consisting of the property above named, to be sold at the front door of the court-house in the city of Joliet, on May 28, 1888, between the hours of 9 A. M. and 5 P. M., without redemption, the master to report the sale for confirmation on May 29, 1888.

The order for sale finds the amounts of the several debts to be paid and decrees the order in which they shall be paid. The debts were large, consisting of the above mortgages and trust deed, and a large amount of receiver's certificates and other miscellaneous debts not necessary to mention.

The plaintiff in error brings the case here by writ of error from this court, and assigns for error the making of the above order of sale, and the order selling the real estate of the said coal company without redemption, and also that the master found the value of the property too low, and that the court erred in approving such finding, and in placing the receiver's certificates ahead of and prior to the Lewis mortgage. The main point relied on, however, to reverse the order of the court below, is the supposed violation by the court below of Secs. 16, 17 and 18, of the statute entitled Judgments and Decrees, allowing redemption. The statute reads as follows: "Sec. 16. When any real estate is sold by virtue of an execution, judgment or decree of foreclosure of mortgage, or the enforcement of mechanic's lien or vendor's lien, or for the payment of money, it shall be the duty of the sheriff, master in chancery or other officer, instead of executing a deed for the premises sold, to give the purchaser a certificate * * * and the purchaser will be entitled to a deed unless the premises shall be redeemed, as provided in this act."

Sec. 17 provides for recording the certificate.

Sec. 18 says: "Any defendant, his heirs, administrators or assigns, or any person interested in the premises through or under the defendant may, within twelve months from said sale, redeem the real estate so sold * * * whereupon such sale and certificate shall be null and void."

We have examined the brief of plaintiff in error on this question with the care that its importance deserves, but are forced to the conclusion that the above statute does not apply in a case like this.

This is to be more likened to a sale by the assignee of an insolvent estate, or in bankruptcy under the order of the court, or in the settling up of a partnership estate where real estate is sold for the purpose of reducing the assets to money, with which to effect the payment of the debts and the distribution of the estate, than to a common sale under the decree of court specified in the above recited statute. The court in the receivership had the entire control of the property in possession of the receiver, as well as the legal title in the receiver, placed there by the voluntary action of the plaintiff in error itself. The court was made the custodian of the property to administer, manage and sell it for the best interest of all. It was the agent of the plaintiff in error to sell and dispose of the property for the benefit of the unsecured creditors and the receiver's certificates, as well as for the trust deed and mortgage, and its functions were not to foreclose these mortgage securities, but to administer and sell the property for the general benefit of the creditors. Then, again, we think that the case here may very properly fall within the category of cases where the property consists of real and personal assets so intermixed as to constitute a unit, where it can not be sold separately without damage to the property, as railroad right of way, track engines, rolling stock, etc., and may be regarded as an exception to the general rule. It may properly fall within the principle of the following cases: *Hammock v. Loan and Trust Co.*, 105 U. S. 77; *Peoria & S. R. R. Co. v. Thompson*, 103 Ill. 187. We think, therefore, that the order of sale without redemption was not only proper, but it would have been improper not to have so ordered it.

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The point in regard to the finding of the master of the values of the property is of little importance, whether too high or too low, as it does not make the debts any more or less, or affect the amount of the sale. It is not an error, if an error, for which the order could be reversed.

The other point, that the certificates of the receiver are put ahead, in order of payment, of the Lewis mortgage, can not be raised here by the plaintiff in error, as Lewis has not joined in this writ of error and he alone is affected.

Much has been said and argued, by counsel for the plaintiff in error, in regard to the alleged bad faith and oppressive conduct of the defendant in error, in inducing it to borrow money on the property and then, contrary to expectation, pushing for its sale with design to acquire it at a sacrifice. Were these charges well founded, upon which subject we express no opinion, we would certainly wish it were otherwise; but the right to the relief the law gives one having a claim past due against another to have it paid or force the sale of the debtor's property, can not be withheld on such consideration. The law does not regard it as oppression. The law will enforce contracts and payments notwithstanding the sacrifice of the debtor's property, but in doing so it will be careful to do the latter as little harm as possible.

Seeing no error in the record, the order of the court below is affirmed, and it is further ordered that the cause be remanded to the court below with instructions by supplemental decree to fix a time and place of sale, and the manner of advertisement thereof, as in its discretion it may deem best.

Order affirmed and cause remanded.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—MAY TERM, 1887.

EDWARD PRINCE

V.

THE CITY OF QUINCY.

Municipal Corporations—Indebtedness—Constitutional Limit—Contract to Furnish Water—Municipal Torts—Quantum Meruit—Fraud—Estoppel—Former Adjudication.

1. The constitutional limitation of municipal indebtedness applies to a contract for a term of years relating to ordinary current expenses, payable out of current revenues.

2. A municipal corporation is not liable in tort, when the alleged tort arises from the breach of a contract which is void by prohibition of the Constitution.

3. In the case presented, it is *held*: That monthly installments for water, due the owner of water works, under the terms of a contract for a period of years, constitute a municipal indebtedness; that a failure to pay such instalments out of current revenues, the municipality being already indebted beyond the constitutional limit, does not amount to a tort; that a former suit in assumpsit operates as a former adjudication; and that the use of water by the defendant without intending to pay for it was not fraudulent.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

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MR. WILLIAM McFADON, for appellant.

The constitutional provision relating to indebtedness does not obliterate, abolish or extinguish any of the powers of a city in relation to current expenses, as the same are conferred by its charter, but its chartered powers in such regards are, notwithstanding said provision, still left in force as there conferred. *Valparaiso v. Gardner*, 97 Ind. 1; *Grant v. Davenport*, 36 Iowa, 396; *East St. Louis v. E. St. Louis Gas Co.*, 98 Ill. 415; *Railway Co. v. City of Jacksonville*, 114 Ill. 567; *Laycock v. Baton Rouge*, 35 La. Ann. 475; *Tax Payers' Assn. v. City of New Orleans*, 33 La. Ann. 571; *Smith v. Town of Dedham, Mass.*, 10 N. E. Rep. 783.

Quincy, by its charter, and prior to the passage of the constitutional provision aforesaid, being empowered "to provide the city with water, to erect hydrants and pumps in the street for the convenience of its inhabitants," had the power to do the same thing after and notwithstanding the going into force of said provision. *City of Quincy v. Bull*, 106 Ill. 350; *Session (Private Laws) 1857*, p. 181, Sec. 22; *Session Laws 1840*, p. 116, Sec. 8.

By a uniform current of decisions in States where a constitutional or statutory limitation restricts the incurring of indebtedness by municipalities beyond a certain point, the indebtedness of a city, if upon a time contract for current expenses, does not arise at the time of making such contract. If the opposite were the rule, the aggregate of all the payments to be made during the entire duration of the contract, would constitute an indebtedness of such city, arising at the moment such contract was made. The true rule upon the authorities is that the indebtedness under such contract only arises from month to month, as and when the article contracted for is furnished. *Smith v. Dedham*, 10 N. E. Rep. 783; *East St. Louis v. E. St. Louis Gas Co.*, 98 Ill. 430; *City of Valparaiso v. Gardner*, 97 Ind. 1; *Grant v. Davenport*, 36 Iowa, 396; *Weston v. Syracuse*, 17 N. Y. 113; *Laycock v. City of Baton Rouge*, 35 La. An. 475; *Reynolds v. Shreveport*, 13 La. An. 430; *State v. McCauley*, 15 Cal. 429; *People v. Pacheco*, 27 Cal. 175.

Inasmuch as on a time contract for water (it being a current expense of a city), no indebtedness is created only as and when the water is furnished, and even then no indebtedness is created if the revenue of such city be applied in payment of the successive installments due under the contract, it follows that the only effect of the constitutional provision relating to indebtedness above referred to, as applied to a city indebted up to the constitutional limit, is to so change the legal effect of its contracts as to current expenses, as that the same, instead of being payable generally by and against a city as theretofore, become and are payable specifically and specially out of its revenue. *East St. Louis v. East St. Louis Gas Co.*, 98 Ill. 430.

The decisions of courts upon contracts which have been held payable out of revenue, or a special revenue, become, then, applicable to the case in hand, and from these decisions, it is clear in such cases that any default on the part of municipal authorities in collecting such revenue, or in taking the necessary steps to give such revenue to the parties entitled to the same, or to make the same available to them, is a wrong on the part of the officers, for which the city itself is liable in an action of tort. *Clayburgh v. City of Chicago*, 25 Ill. 536; *Lansing v. Van Gorder*, 24 Mich. 456; *Chaffee v. Granger*, 6 Mich. 51; 2 *Dillon Mun. Corp.*, Sec. 968; *Kearney v. Covington*, 1 Metc. (Ky.) 339; *McCullough v. The Mayor of Brooklyn*, 23 Wend. 460; *Western v. The Mayor of Brooklyn*, 23 Wend. 334; *Shearman & Red. on Neg.*, Sec. 136.

To show that a tort has been committed in the case at bar, in the manner the city officials have dealt with said appellant, is the object of this subdivision of our brief, and that this is so appears from these considerations:

The charter of the city of Quincy provides that the city council of said city shall have power to appropriate money and provide for the payment of the expenses of the city. *Private Session Laws, Illinois, 1857*, p. 163, Chap. 4, Sec. 4.

The vesting the power last aforesaid in the city council of Quincy, carried with it the duty on the part of that city council to appropriate money and provide for the payment of the expenses of the city, for the failure to perform which an action

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lies in favor of the party aggrieved against the city. *Clayburgh v. Chicago*, 25 Ill. 536; *City of Cairo v. Campbell*, 116 Ill. 309; *Seagraves v. City of Alton*, 13 Ill. 366; *Chicago v. Robbins*, 2 Black, 418; *Bloomington v. Bay*, 42 Ill. 507; *Lansing v. Van Gorder*, 24 Mich. 456.

Under said provision of the charter it was not only the duty of such city council to appropriate money, but it was also the duty of that body to audit bills, and to pass any and all ordinances and resolutions, and to do any and all acts and things necessary to give appellant his money. *Frank v. San Francisco*, 21 Cal. 695; *The State ex rel. v. Cincinnati*, 19 Ohio, 195; *City of Cairo v. Campbell*, 116 Ill. 309.

Action on the part of Quincy's city council under such power is not legislative or discretionary, but the exercise of such power by such council is imperative in favor of the party entitled to the money for current expenses furnished. *City of Cairo v. Campbell*, 116 Ill. 309; *Supervisors v. U. S.*, 4 Wall. 447; *Galena v. Amy*, 5 Wall. 705; *Commonwealth v. Pittsburgh*, 34 Pa. St. 513; *Robinson v. Butts City*, 43 Cal. 354; *Frank v. Supervisors*, 21 Cal. 695; 2 Dill. on Munic. Corp., Sec. 857.

A duty being imposed on Quincy's council by the chartered provision last cited, and that duty being omitted, and by virtue of such omission a substantial loss of money resulting to said appellant, we have here all the elements of a tort. *Loup v. California S. R. R. Co.*, 63 Cal. 99; *Underhill on Torts*, 4.

The constitutional provision relating to indebtedness does not constitute a defense to an action against a city, though indebted to the five per cent. limit, where the action is a tort brought for the negligence of its agents. *City of Chicago v. Sexton*, 115 Ill. 245; *Bloomington v. Perdue*, 99 Ill. 329; *Bartle v. Des Moines*, 38 Iowa 414; *Rice v. Des Moines*, 40 Iowa, 638.

The contract sued on for water was older and of earlier date than any other contracts relating to any of its current expenses for the respective fiscal years aforesaid. The contract was itself an appropriation of the future revenues of the city which successive councils, when coming into office, were bound to

regard. *Syracuse v. Weston*, 17 N. Y. 113; *Grant v. Davenport*, 36 Iowa, 396.

And the city of Quincy having revenue enough to pay the claims arising under the contract in the case at bar, its council could not vote away revenue from the appellant, and appropriate it to contracts of later date, and then claim that the contract by said ordinance created was invalid. *Cincinnati v. Cameron*, 33 Ohio St. 375.

It has been held, even in matters which are discretionary with city councils, that a wilful omission to act or an omission to act from malicious motives, is an abuse of discretion and therefore a breach of duty, which is actionable. *Roberts v. City of Chicago*, 26 Ill. 251; *Village of Glencoe v. People*, 78 Ill. 389; *State ex rel. v. Moore*, 42 Ohio St. 108.

For the wilful and malicious omissions of duty and acts on the part of its officers alleged in the declaration and admitted by the demurrer, the appellee is clearly liable.

The appellant desires to call especial attention to the ninth count of his declaration. This count shows the taking and use of appellant's water with the intention of not paying for it, and the use of said water under the facts set out in this count, and with the intention of not paying for it, constitutes a gross fraud on appellant. Had the water not been used up, appellant could recover the same in specie. Having been used up, his remedy is in case for the fraud. *Dow v. Sanborn*, 3 Allen, 182; *Fox v. Webster*, 46 Mo. 184; *Benj. on Sales*, § 440, notes and cases cited; *Stewart v. Emerson*, 52 N. H. 301.

MESSRS. GEORGE A. ANDERSON and CARTER & GOVERT, for appellee.

If there had been a tort, has it not been waived by the plaintiff in bringing his action in assumpsit on the contract? The declaration shows that the plaintiff brought suit against the defendant in assumpsit for the same alleged indebtedness prior to the bringing of the present suit. That suit having been carried through the various courts, and finally decided adversely to the plaintiff by the courts of last resort, the plaintiff changes his form of action and begins a new suit.

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If the action of the city council in refusing to pay the plaintiff's alleged claims amounted to a wrong or tort, it was in his discretion to have either sued in case or to have waived the tort and sued in assumpsit. *State v. Evans*, 35 Ill. 455; *Gray v. St. John*, 35 Ill. 222; *Ives v. Hartley*, 51 Ill. 520; *Alderson v. Ennor*, 45 Ill. 128; *Creel v. Kirkham*, 47 Ill. 344; *DeClercq v. Mungin*, 46 Ill. 112; *Parker v. Tiffany*, 52 Ill. 286.

If plaintiff's theory of the action of the city council in refusing to pay the water bills is correct, he must be held to have waived the wrong in bringing his suit in assumpsit. *Kellogg v. Turpie*, 2 Ill. App. 55; *Brumbach v. Flower*, 20 Ill. App. 219.

We deny that the record shows that there was any fault or wrongful neglect on the part of the city council, but we insist that if it did, the corporation can not be held liable as in tort for a mere non-feasance of the city legislature. And this, whether the contract or indebtedness was or was not prohibited. *Dillon on Mun. Corp.*, Secs. 91, 482, 949, 964, 966 and 1048; *Baker v. State*, 27 Ind. 489; *Morris v. People*, 3 Den. 381; *Wells v. Atlanta*, 43 Ga. 67; *Gillett v. Lyon*, 18 Kan. 410.

Public officers whose offices are created by the act of the Legislature, as members of a city council are not municipal agents or servants. Their neglect is not to be regarded as the neglect of the municipal corporation. And the city is not liable for the non-feasance of its public officers in the performance of their public duties, unless expressly made so by statute. *Wheeler v. Cincinnati*, 19 Ohio St. 19; S. C., 2 Am. R. 368; *Brinkmeyer v. Evansville*, 29 Ind. 187; *West Col. Med. v. City of Cleveland*, 12 Ohio St. 375; *Thomas v. City of Richmond*, 20 Wall. 349; *Dill. Mun. Corp.* Secs. 61 and 372; *Gibbs v. Beaufort*, 20 S. C. 213; S. C., 5 Am. and Eng. Corp. Cas. 428; *Black v. City of Columbia*, 19 S. C. 412; S. C., Am. and Eng. Corp. Cas. 640; *Coleman v. Chester*, 14 S. C. 290.

A legislative corporation established as a part of the government of the country, is not liable for a non-feasance by an omission to observe a law of its own in which no penalty is

provided. *Fowler v. City of Alexandria*, 3 Pet. (U. S.) 408.

It is not liable for the non-exercise of, or for the manner in which in good faith it exercises, discretionary powers of a public character. 2 Dillon Mun. Corp. 949, 3d Ed., and cases cited; Boone on Corporations. Sec. 300.

In *Board of Trustees v. Schroeder*, 58 Ill. 353, it was held that a municipal corporation is not liable for the illegal and unauthorized acts of its officers in administering an ordinance. Nor is it made liable by the fact that its board of trustees are cognizant of the tortious act, or even participate therein. *Larkins v. Saginaw*, 11 Mich. 88; *Detroit v. Blakely*, 21 Mich. 84; S. C., 4 Am. Rep. 457; *Mulcairns v. City of Janesville*, 29 N. W. Rep. 565, and cases cited and note; 2 Thompson on Neg., 675, 731, 818.

In *Detroit v. Blakely*, 21 Mich. 84, Judge Cooley in his opinion, dissenting in some other points from the majority of the court, said: "I fully concur that a municipal corporation is not liable to an individual damnified by the exercise or failure to exercise a legislative authority."

PLEASANTS, J. This was an action on the case brought by the appellant against appellee. The declaration contained eleven counts. A demurrer, general and special, to the whole declaration and to each count thereof was sustained, and the plaintiff abiding, a judgment of *nil capiat* and for costs was rendered against him, from which he took this appeal. The question is upon the sufficiency of this declaration.

In the first count it is alleged that the defendant was incorporated by special act which empowered it, among other things, "to appropriate money and provide for the payment of the debt and expenses of the city;" that in August, 1873, it passed an ordinance (set out *in haec verba*) which was duly accepted by plaintiff and so became a contract between them, whereby plaintiff was to construct, maintain and keep in operation within the corporate limits of the city a general system of water works, to be extended and enlarged from time to time as therein prescribed, and the defendant was to pay him in monthly installments from the time water should be turned

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on, the sum of \$2,600 per annum, and also in like manner \$200 per annum for each of the first one hundred hydrants, which contract was by its terms to run for a period of thirty years; that the plaintiff fully performed all the things by said contract required of him and within the time thereby limited for that purpose, and at all times during the fiscal year next mentioned had and furnished water through seventy-seven hydrants, on each of which water had been previously turned, and all of which had been located under and pursuant to the provisions of said contract; that the city had a fiscal year of its own, commencing March 31, 1880, and an income and revenue of its own for said year; that, at the commencement of said year and at all times during the same, it was indebted upon its valid bonds theretofore issued and then outstanding and unpaid, to the amount of more than \$1,700,000, which greatly exceed five per cent. on the value of all the taxable property within its limits, as ascertained by the last assessment for State and county taxes made before the commencement of said year, or by any assessment therefor made during said year; that by reason thereof plaintiff became and was entitled to payment out of the revenue of said year, and the city council ought to have provided out of the same for the payment to him of the contract rate per hydrant specified in said ordinance; that, although the city during said fiscal year received and used the water so furnished through said seventy-seven hydrants, and its income and revenue during said year was ample and sufficient for such payment in full, nevertheless the city council wilfully neglected and refused to appropriate the revenue of said year to, or provide for the payment of, the amounts so due to the plaintiff, but on the contrary permitted said revenue to be dissipated, scattered and diverted from the payment thereof; by means whereof the revenue of said fiscal year was lost to the plaintiff, and the amount due him for water furnished to the defendant during said year remains unrecovered and unpaid.

In this count the duty of the council is alleged to have been to provide for the payment to plaintiff, out of the revenues of the year, of the amount of the contract rate for the water fur-

nished during the year. This duty is predicated upon (1) the chartered power of the council to appropriate money and provide for the payment of the debts and expenses of the city; (2) its express contract with plaintiff, performed on his part; (3) its indebtedness, previously and then existing, to the full limit of its constitutional power to contract indebtedness, and (4) its possession of revenue for that year sufficient for such payment. The breach complained of is its refusal so to provide for payment to the plaintiff and the appropriation of said revenue to other uses; and the damage or injury to the plaintiff alleged, is the non-payment of his claim.

The other counts, excepting the ninth and eleventh, are in principle and general form the same as the first, the difference being, that some relate to the claims for water furnished during the two following years, respectively; some aver that an actual though insufficient appropriation was made for the claim for the year therein mentioned; some allege the contract as one implied from the receipt and use of the water to pay the plaintiff *quantum meruit*; some state the duty was to pay for current expenses *pro rata*, and some charge the refusal to pay as designed and malicious.

It is not proposed to notice all of the many points discussed and authorities cited by counsel, but only two or three which in the light of our own State decisions are deemed decisive of the question here presented.

At first blush it would seem that by each of these counts it is sought to charge the city in tort for the simple refusal of its council to pay an indebtedness contracted directly in the face of an express constitutional prohibition, and so, to recover as damages the precise amount of that indebtedness, with interest from the time when it became due by the terms of the contract. But counsel, as was to be expected, disclaim a position so clearly untenable. Yet this apparent effect of all the facts alleged is obviated only, if at all, by the introduction into the pleading itself, by inference and as argument, of certain propositions of law touching the effect of the constitutional prohibition upon the contract and claim in question, and the character of the fund called "current revenue," which are admitted to be essential to the sufficiency of these counts.

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Those propositions are that the legal effect of the prohibition upon plaintiff's claim was to make it, not non-payable, but payable only out of current revenue, and that current revenue was a specific fund for its payment; and they raise the questions we purpose, mainly, to consider.

The reasoning in support of them, and which develops the theory of appellant's case more fully, is this: (1) Conceding that appellee had already reached the limit of indebtedness prescribed by Sec. 12 of Art. IX of the Constitution, the prohibition therein contained did not abrogate its charter powers "to provide the city with water, and to erect hydrants and pumps in the streets for the convenience of its inhabitants," and "to appropriate money and provide for the payment of the * * * expenses of the city," or any others, but only forbade that in the exercise of these powers it should contract any further indebtedness; (2) that a city so indebted may nevertheless incur current expenses for police service, lighting the streets, water supply and the like, provided only it does not thereby add to its indebtedness; (3) that to contract for such services, if it can pay for them out of current revenue, is not necessarily to add to its existing indebtedness; (4) that under continuing contracts therefor, providing for periodical payments, no indebtedness can arise until the service is rendered up to a period for payment, and if payment is then made none has been thereby added to that already existing, within the meaning of the prohibition; (5) that, being forbidden to contract indebtedness for them directly, or to borrow means of payment, the only resource is the current revenue; (6) that being the only available means of payment, this current revenue is a specific fund for that purpose; (7) that so to apply it is therefore a specific ministerial duty of the council, made all the more clear and binding by its limitation to this means; (8) and that the refusal, neglect or failure to perform such a duty is a municipal tort.

Of this series of propositions we hold the third, fourth, fifth and sixth, which embrace the two previously stated, to be unsound; and if they are so, the seventh and eighth are inapplicable.

The constitutional provision referred to is that "no * * * municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five *per centum* on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness."

This language leaves nothing for construction except to ascertain what it is "to become indebted" in the sense here intended; for none that could be employed would be more apt to show that upon all such contract liabilities as are within its purview this provision operates with only one effect, which is to disallow them. It is too plain for argument that it does not classify them as non-payable and payable out of special funds, or otherwise, nor change any from being a charge against the city generally into a charge against the current revenue only, but makes them all alike absolutely non-payable and void. If, then, the contention of counsel that it so changed the contract and claim here in question is an admission that they were within its purview, it admits away their case; and if the fact that without that provision it would have been an indebtedness against the city generally shows it to be so, then that fact, independently of any admission, must also be fatal. It either was or was not within the purview of the inhibition. If not, it was in no way affected by it; if it was, the refusal to pay it, however caused or manifested, could not be a tort.

We apprehend the real position of counsel to be, that because this claim was properly payable out of current revenues, it was not within the inhibition, which is therefore invoked only as further certifying and enhancing the alleged duty of the council to pay it accordingly.

But it can not be that the duty referred to was that of anticipating the revenue and avoiding liability, by assigning the amount required, without recourse, out of a tax already levied for the purpose, as indicated in the Edwards case (84 Ill. 633). It is not averred that any such course was ever requested or suggested by appellant, nor does it appear that

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its necessity or propriety was apprehended by either party. Another and different one was expressly provided, with his full understanding and assent. In reference to both the \$2,600 per annum and the additional sum per hydrant the language of the ordinance is the same: "Said city shall pay said Prince in monthly installments, from the time water is turned on," etc. (Sections four and seven.) Thus the contract was not to provide for payment, but to pay; not out of a particular fund, but absolutely; and the obligation for the delivery of the money was not cast upon its officers, but assumed by the corporation. Failure in duty respecting this claim must therefore consist in failure to pay it according to the contract. So we understand the wrong really charged to be, not in procuring the contract or its performance without securing or providing for payment in a particular way, but in refusing to pay.

By its charter, the amount of taxes the city could levy in any one year for all purposes, except for interest on its registered bonds, was limited to \$1.03 on the \$100 of the assessed valuation of all the real and personal property therein. *Binkert v. Jansen*, 94 Ill. 283. The amount of such valuation, or of the taxes levied, or of the current revenue in any year, or how it was applied, or that one dollar was improperly applied, except as it was thereby diverted from the payment of appellant's water bills, is nowhere averred. Therefore the dissipation and scattering of the revenue, as alleged, involved no wrong unless the payment of appellant was a duty; and so the charge is reduced to a refusal to pay him, which, in this case, would be a mere breach of the contract in that behalf, unless such payment was a duty specifically imposed by something besides the contract itself, since no other element of a tort is alleged or discovered in the fact or cause or manner of the refusal; and hence the importance attached to the fact of the city's existing indebtedness, and the consequent effect, as supposed, of the constitutional inhibition.

Thus the position of appellant seems to be that the contract being for current supplies to be furnished continuously for a specified sum per annum, payable monthly, within the

amount of current revenue, did not create such a liability on the part of the city as was forbidden, and if the periodical payments provided for had been made when due by its terms no indebtedness within the meaning of the Constitution would have arisen; and that his claim became an indebtedness, and therefore non-payable as such, by the failure to pay it when due, which was wholly the fault of the city council, and is the tort here complained of.

There is no doubt that the effect of the inhibition was to require the city, indebted as it was, to carry on its corporate operations, while so indebted, upon the cash or pay-as-you-go plan, and not upon credit to any extent or for any purpose; and the question is whether the course contemplated by this contract was in accordance with that plan.

It clearly did not contemplate any payment in advance, but that a claim against the city would be constantly accruing, payable from month to month, for water previously furnished—"from the time water is turned on"—and that, having been furnished, the obligation to make these payments at the times specified would be absolute and wholly irrespective of its ability or actual possession, at such times, of cash wherewith to make them. Thus some credit was contracted, and not upon the faith of money in hand when performance by appellant was begun, but of money expected to be in hand when it should be completed. And under the charter limitation of the amount of annual taxes to be levied and the known method of their collection, some risk of its unavoidable extension beyond the fiscal year was necessarily incurred.

Appellant's claim arose directly upon this contract, as executed *pro tanto*. It was for a specified sum of money thereby agreed to be paid for certain services to be rendered, which were rendered. Had there been no limit to the amount for which the city could become indebted, he could have recovered it upon a general judgment (*East St. Louis v. E. St. L. G. L. & C. Co.*, 98 Ill. 415), and then have had a *mandamus* for the levy and collection of a tax to pay it. *City of Cairo v. Campbell*, 116 Ill. 365. In other words, it would have been a proper debt against the city—a contract liability which

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had become absolute for a sum certain in money. Nor is it perceived how it could have been any the less a debt against the city if it had been made payable out of a sufficient current revenue or any specific fund, or if the city had been all the time possessed of money enough to pay it and all other current expenses, or if it had been actually paid when due. Such payment would have extinguished the indebtedness, but could not have anticipated, prevented or avoided it. That accrued from day to day as the water was furnished (E. St. L. case, *supra*, p. 430), though it was not payable until the end of the month; for there was no default on the part of appellant nor any failure of any contingency on which his right to the money, under the contract, if it had been valid, depended.

Then, if the indebtedness so arising was forbidden, the contract upon which it arose—which expressly contemplated and provided for it, though in itself executory and creating only a contingent liability, was also forbidden. Prohibition of the end is prohibition of the direct, designed and appropriate means. Being an attempt by the city to put it in the power of appellant and induce him to acquire an absolute indebtedness against itself, it was, so far as executed, as clearly against the policy and provision of the Constitution as the creation of a present debt. If it had not been executed, nor any attempt been made to enforce it or to recover for a breach of it, and so far as it remains unexecuted, of course no such question could arise, there would be nothing to which the inhibition could apply. East St. Louis case, *supra*.

In the City of Springfield v. Edwards, 84 Ill. 632, the court construing this provision, say it is "against becoming indebted, that is, voluntarily incurring a legal liability to pay, in any manner or for any purpose, when a given amount of indebtedness has previously been incurred. * * * A debt, payable in the future is, obviously, no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition. If a contract or undertak-

ing contemplates, in any contingency, a liability to pay, when the contingency occurs the liability is absolute, the debt exists, and it differs from a present, unqualified promise to pay, only in the manner by which the indebtedness was incurred. And, since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses, or for something else." These general propositions would seem to cover all the material points here involved, but the court went further and specifically held it unlawful for a city so indebted to incur a liability for current expenses or anything else, even though it should at the same time (as some of the counts allege it did here) make a final appropriation, within the limits of the revenue accruing, to meet it; that to avail itself of current but uncollected revenue for such purpose it must go further and assign the amount out of a tax actually levied, and without recourse, in such manner as to "leave upon the city no future obligation, either absolute or contingent, whereby its debt might be increased."

The authorities to the contrary here relied on, from Iowa, California, Ohio and Louisiana, were there considered and expressly held to be overborne by the plain, broad terms of our Constitution. We can not avoid the conclusion from this decision, that the contract here in question was void, and that the claim of appellant, whether upon the contract or *quantum meruit*, was not legally payable out of current revenue or otherwise.

In *Law v. The People*, 87 Ill. 385, that case was approved and the propositions above quoted were reaffirmed, the court declaring the inhibition "was intended to embrace indebtedness of every description, nature and kind, and in every sense of the term, whatever the character or form by which it was evidenced, when made or issued after the limit should be reached." This leaves no possible ground for the supposed distinction between an indebtedness for current expenses and on other accounts, or between one payable out of a specific fund and one chargeable against the city generally. See also *Fuller v. City of Chicago*, 89 Ill. 282; *Fuller v. Heath*, 89 Ill.

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296; Howell v. City of Peoria, 90 Ill. 104; City of Litchfield v. Ballou, 104 U. S. 190.

But still more directly, the questions upon which the right to maintain this action depends, seem to us to be *res adjudicata*. Prince v. The City of Quincy, 105 Ill. 138, was a suit in assumpsit between these same parties, upon the contract and for the claim here under consideration. The defense pleaded was, in substance, that at the time of making the contract sued on the city was, and ever since had continued to be, otherwise indebted in an amount exceeding the constitutional limit; the plaintiff replied that the several sums of money sought to be recovered "pertained to the ordinary expenses of the defendant in the administration of the affairs and government of the city, and that, at the time of the making of said contract, the said several sums of money so provided to be paid monthly by said defendant to said plaintiff, together with other ordinary expenses of the government of the said defendant, were within the limits of the current revenues of said defendant;" and the case was disposed of on demurrer to this replication.

It was there contended on behalf of appellant that the term "indebtedness" did not apply to contracts relating to the ordinary current expenses of a city, payable out of the current revenues, and the Iowa and California cases were cited; but the court held that "to so construe the Constitution would be to add a provision, in the nature of an exception, which the framers of that instrument did not see proper to insert."

The plea was therefore held good and the replication no sufficient answer to it; the two preceding cases were approved and the construction therein given was declared to be the result of the "deliberate and mature consideration" of the court. There, it was admitted by the pleading that the parties made this contract; that the plaintiff performed it on his part; that the water supplied was one of the ordinary current expenses of the city; that the price agreed on as claimed and the other current expenses were within the amount of current revenue, and that the city refused to pay him; and yet he could not recover, because by reason of its existing indebtedness the contract sued on and the claim so arisen thereon

were prohibited by the supreme law of the State, and therefore void. This case and another like it, reported in the same volume at page 215, distinctly hold that the identical claim here in question was a debt added to that already existing against the city, in excess of the limit prescribed, and directly within the inhibition.

It must follow that the refusal to pay it when due by the terms of the contract, or at any time afterward, whether from inability in consequence of the diversion of the revenues to other uses to its exclusion, or other causes, or from wilfulness, could not be a tort. Its payment at that time, out of current revenues or any other fund, or in any way whatsoever, instead of being a duty enhanced or imposed by any law, contract, fact or condition, was absolutely forbidden and would have been unlawful. There being no duty to pay, the refusal could make no case for *mandamus* or any other proceeding at the suit of appellant; and the case of *Clayburgh v. City of Chicago*, 25 Ill. 526, and others cited to like effect, are not in point.

But it is said that under the form of contract here presented, there could be no indebtedness until the period for payment arrived, and (if we understand counsel) that had payment been then made, none would ever have arisen, within the meaning of the inhibition. The case of *East St. Louis v. E. St. L. G. L. & C. Co.*, 98 Ill. 430, is cited as if it modified the decisions above referred to on this point. There it was for the supply of gas-light for a long term of years, at a stipulated price per lamp per year, payable in monthly installments; and, while the court held that the price for the whole term was not to be considered an indebtedness incurred on the making of the contract, within the meaning of the Constitution, we understand it to have held that the installments, as they became due, would be, even if they were paid at the time. Its language is: "Had the contract been performed in compliance with its terms * * * there would have arisen no indebtedness on the part of the city for more than one month's gas supply." (Counsel will observe that from the quotation in their brief, at bottom of page 16, two important words are omitted—

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doubtless through inadvertence.) This, we apprehend, is strictly in harmony with that herein above quoted from the Edwards case, and in Prince v. City of Quincy, 105 Ill. 143. We have the direct authority of the court itself for saying it does not modify those referred to. A recovery was allowed because the amount accrued and claimed did not increase the city's debt beyond the limit prescribed.

The argument seems also to be pervaded by a somewhat vague assumption of a distinction between payment and providing for payment, as a basis for the contention that, by virtue of the charter power to provide for the payment of the expenses of the city, independently of the contract, or under the contract as claimed to be changed by the inhibition, a duty was devolved upon the council in respect to appellant's claim to take whatever action was necessary to satisfy it when it should become due. That would include the appropriation of money, the levying of a special tax, the auditing of bills, the passage of ordinances and resolutions, the issuing of warrants against the tax levied, without recourse, and any and all other things required by law, to be done before it became due by the terms of the contract, in order to give him the money contemplated by the contract, or that he ought to have. The claim is that the omission of any such act, resulting in a substantial loss to appellant, constitutes a tort; and it is urged as being entirely consistent with the admission or fact that the claim did become such an indebtedness as was prohibited and therefore unrecoverable as such.

It is true that notwithstanding its indebtedness and the inhibition, the city continued to have authority to provide a water-supply, and that it remained under obligation to pay its current expenses consistently with the Constitution. If, however, upon its contracting for proper supplies or services without any express provision as to the mode of payment, the law would imply a duty to take all needful steps to effect it, as intimated in Law v. The People, 87 Ill. 400, and if it might so fail to perform as to be guilty of a tort, that, as we have attempted to show, is not the case presented by this declaration; and if it were, it must surely be that this duty could be made unavailable in this form of action by the consent

of the party to whom it would otherwise be owed. How can appellant charge that the city tortiously omitted to assign enough of the uncollected revenue to pay him, in such time and manner as to avoid all liability on account of the water supplied, since he expressly agreed to give and did give it credit therefor and looked to it for payment when and after it should become due according to the agreement? This agreement can not be ignored. It is alleged and set forth in each of these counts. It fully shows all the obligation he asked or the city assumed in that behalf. Its performance would have accomplished the same object, but in quite a different manner. His stipulation for, and reliance upon, its performance, were therefore necessarily a consent to the non-performance of the other, which for that reason could be no wrong to him.

For it is not pretended that such consent was obtained by the misrepresentation or concealment of any fact, or other fraud on the part of the council. The truth evidently is that both he and the board that passed the ordinance supposed the inhibition (if it was in their contemplation at all) would not affect this contract; that the agreement to pay in monthly installments, provided they could be paid as they became due out of current revenue, would not operate to increase the corporate indebtedness; that if each board should pay the bills of its term as they became due out of current revenues, or so applied them that, at its close, no indebtedness for the current expenses thereof would be left unsettled and open against the city, there would be no infringement of it. Of the plausibility or reasonableness of this view there is no need to say more than that our Supreme Court, differing, perhaps, from some others as to like cases, pronounced against it. Being entertained by these parties at the time, however, they innocently provided for and created this monthly debt, and, so long as it was held, the council continued to pay it.

A later board, coming to doubt its authority, on that ground refused to do so any longer. Still appellant did not shut off the water, nor propose a new arrangement for its supply, nor go on under any implied promise to pay him *quantum meruit*. On the contrary, he insisted on the validity of the ordinance

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and brought suit upon it; although, has he alleges in the eleventh count, on the invitation of the council, and upon the promise that, if it should be decided against him, the city would pay him for water furnished in the meantime a reasonable price; which would seem to have been an attempt to create another contingent liability, quite as obnoxious to the Constitution as the one the council had just repudiated and the Supreme Court afterward condemned.

We think this contract for credit, voluntarily made, without fraud on the part of the council, or ignorance of any material fact on the part of appellant, estops him to charge that the failure to pay or make provision for payment, otherwise than as so agreed, was a wrong. The rule embodied in the maxim, *volenti non fit injuria*, is, "that no one can maintain an action for a wrong where he has consented or contributed to the act which occasions his loss." Broom's Leg. Max. (2d Ed.) 201. And the estopping fact, appearing in the declaration, may be taken advantage of on demurrer.

The ninth count, setting out the contract and averring its performance by plaintiff and payment therefor by defendant for some years, then alleges that, although defendant afterward disowned it and notified plaintiff that it would no longer be bound thereby, nevertheless it continued to use the water, without intending to pay but intending not to pay for it. This is likened to the fraud of obtaining personal property under pretense of purchasing, but with the intention not to pay. We think there is a wide difference. Deceit, which is the essence of fraud, is the chief characteristic of that case, but is not even charged in this. These works were established and in actual operation, supplying the city and its inhabitants, under an ordinance which may have been valid as to all or many other of its provisions, though void as to that relating to payment by the corporation. *City of Quincy v. Bull*, 106 Ill. 348, 352. Section 17 provides that "said Prince shall have the right to make all needful rules and regulations for the government of said works in all its branches and departments, and no person, except the city council or said Prince, or their properly authorized agents, shall have the right to open or interfere in any way with any fire hydrant in said city, and

said city shall have at all times the right to use water from said fire hydrants for the following purposes, and no other, viz., for the extinguishment of fires, for the use, exercise and practice of fire engines, for filling fire cisterns and other legitimate and proper fire purposes." Under this provision, duty to persons and property within its limits required the city to use the water for these purposes, notwithstanding its intention not to pay for it according to the terms of the ordinance. It is not claimed that it used it for any other, nor that it "disowned" any other provision of the ordinance than that which was "disallowed" by the Constitution. Duty also required it to disown that, and for so doing it should not be subject to any penalty, forfeiture or restriction of right under other and valid provisions, nor to any unfavorable presumptions or odium that should attach to a wilful repudiator. The giving of the notice mentioned was, therefore, an act of frankness and justice to appellant, and not at all indicative of fraud.

For aught alleged in this count it would have agreed to any lawful arrangement, if any had been proposed, for the satisfaction of his claim. The averment of its intention not to pay seems to be an inference from the notice, and in connection with such notice, and disownment of the contract, as stated, is to be limited to an intention not to pay under that contract. So, also, for aught that appears, if he had merely acquiesced in the view taken by appellee of that provision, it would have accepted the implications referred to in *Law v. The People*, above mentioned. But in any case the count is defective in not averring that any deceit was practiced by appellee, or that appellant was, in fact, ignorant of any intention it entertained; that is, it does not expressly charge fraud, and the fact that the city continued to use the water after notice given, and with intention not to pay for it under the circumstances stated, does not necessarily imply or import fraud.

We have already observed that the seventh count avers no more than the breach of another agreement that was also inhibited by the Constitution, and not a tort.

Perceiving no error in the record, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

HERMAN STEARNS ET AL.

V.

JOSEPH F. COOK.

28 511
58 594

Sales—Exchange of Live Stock—Acceptance—Waiver—Damages—Instructions.

In an action for an alleged breach of contract, whereby loss was sustained through the death of a Spanish jack received in a horse trade, it being claimed that his death was caused by his being ill-used by the defendant, in driving him to the house of the plaintiff, it is *held*: That the verdict for the plaintiff was contrary to the evidence, and that the instructions were erroneous, particularly in not stating what would constitute an acceptance amounting to a waiver of defects.

[Opinion filed May 25, 1888.]

APPEAL from the County Court of Vermilion County; the Hon. D. D. EVANS, Judge, presiding.

Mr. W. R. LAWRENCE, for the appellants.

Mr. J. B. MANN, for appellee.

PLEASANTS, J. Appellee brought this suit in assumpsit against appellants for an alleged breach of contract for the exchange of a Clydesdale horse, of plaintiff, for a buck-board set of harness, and a Spanish jack, of the defendants, to be made at the plaintiff's residence, which was between twenty and twenty-five miles distant from that of the defendants. The contract was made on the 17th of December, 1886, and the particular promise counted on, as stated in the declaration, was that the defendants would deliver the jack at the plaintiff's house, "at a time when the roads were soft, so that the feet and limbs of said jack would not be injured by transferring him from the place of residence of said defendants to the house of plaintiff, and would deliver said jack in good condition;" and the breach alleged is that they did not

deliver him when the roads were soft, but when they were frozen; by means whereof his feet and limbs were greatly injured, and he became lame, sick and disordered, and finally died. It is then averred that without any knowledge on his part of such lameness, sickness and disorder, the plaintiff delivered his horse to the defendants.

The second count is in substance the same, with the added averments that defendants received the plaintiff's horse upon the express representation on their part that said jack had not suffered from being led over such hard and frozen roads, but had led freely and had not lagged any except as to the last mile; that plaintiff relied on said statements, and was ignorant of their falsity, and was thereby induced to part with his horse; that said representations were not true; that said jack did suffer, and was then suffering from being led over said hard and frozen roads, and had not led freely, but lagged for a long distance.

It is said the second count is in case. We think not. It is not averred that the representations set forth were fraudulently made or knowingly false. The averments in relation to them were unnecessary, but evidently made to explain the delivery of plaintiff's horse, and meet the anticipated defense of waiver by acceptance of the jack. Appellants showed their understanding of it at the time by filing the plea of *non assumpsit* to the whole declaration.

It appears that the jack, with the other property of the defendants mentioned, was delivered to plaintiff at his house about five o'clock in the afternoon of December 20, 1886. He had been led since six o'clock in the morning of that day, all the way from their residence, over roads that were frozen hard when they started, but thawed a little on the surface about noon, and so became somewhat slippery. There is no dispute as to his previous condition; all agree it was good. The testimony as to his treatment and appearance on the way, is conflicting. A number of witnesses who saw him at a point five miles from the plaintiff's house and others nearer, say he was lagging, looked overdone and was whipped considerably to be kept going. Defendants themselves admit that

he was at times obstinate, but say he required and received no more than an occasional touching up or tapping. Plaintiff was at home when they arrived, saw him, fed him and put him for the night in a shed made of hay and banked up, twelve or fourteen feet long and eight or ten feet wide, with an opening on the east side four feet wide. The defendant Herman and his brother, who had brought him, stayed that night at plaintiff's house. The next morning he went to the barn lot, saw plaintiff and asked him how the jack was, and plaintiff said he was all right and had eaten his feed all right, both night and morning. They stayed to breakfast, and soon afterward received from plaintiff his horse, without a word of complaint from him, and left.

The jack died about four weeks afterward, from what cause is by no means clear. Plaintiff and others testified that upon being led out of the shed on the morning after delivery he appeared stiff and worn out; that his feet were broken off all round; that he was sore and hardly able to walk, and that his back and loins were welted up. They kept blankets on him, wrapped his legs with flannel and bathed them with pepper tea.

But he got no better. Yet he ate all his food for the first two or three days. An expert who saw him on the 22d of December, and concurs in this account of his appearance, says his pulse was not deranged, and he thought him not sick but "simply worn out by fatigue or something of that kind." Opinions differed as to the suitability of the shed in which he was kept the first night. He was a Spanish jack, and therefore could not stand exposure to cold. Herman says there was no door, but only bars, at the opening on the east side, and that he told plaintiff the jack had been kept in a warm box stall, and would be liable to take cold in that shed. Mr. Swim, who had handled jacks for twenty years, and formerly owned this one and had often traveled him to and from fairs as far as twenty miles at a time, testified that he was a good traveler, could go thirty miles a day without injury, and that his feet were good; but that if he were forced over frozen or slippery ground and whipped every few steps to make him go

until he was fatigued, it would probably injure him; and that these jacks are sensitive to cold and should have a warm stall in winter.

Appellants, who are father and son, owned this jack together. The lowest estimate of his value in good condition was \$250, and the verdict was for \$150.

It is difficult to account for this result upon the supposition that the jury finally agreed upon any material question in the case. There was no dispute between these parties about the value of the jack. The difference on that point, and which was slight, was only between the witnesses, all of whom testified on the part of plaintiff. Defendants offered none. So much of their evidence as bore indirectly on that subject was in harmony with that of the plaintiff. It has not been suggested that there is a circumstance in the case to excite a suspicion that the estimate above mentioned was too high. Plaintiff says that in the trade he took him at that estimate and believes he was fully worth it. Everything in the evidence that tends to change it, tends to increase it. The court, in each of the two instructions given for the plaintiff, directed the jury, if they found for him, to "assess his damages at the amount the testimony shows the jack was reasonably worth," and the almost irresistible inference from their verdict, in the light of the evidence, is that they did not find for him, rather than that they wilfully disregarded that direction. There was some evidence tending to show fault on his part in respect to the shed, above noticed, and other treatment of the animal. They may have found that the loss was due in part to the fault of each, and so found in part for and in part against each. If so it was upon a misunderstanding of the law, and resulting in injustice, ought not to stand; for the court should not assume to determine which party was wronged, thereby substituting its own finding for that of the jury upon an issue submitted to theirs only.

Nor can it be well said that the error, if any, was in favor of the defendants. It may be that upon a right understanding of the law the finding would have been for them. They do not complain that the verdict was for too small an amount, but that it was for any at all.

Stearns v. Cook.

They claim, and seem to have believed, that the jack was in good condition when delivered. They freely submitted him to the plaintiff's observation, remained there until after breakfast the next day, by which time the effect of his travel would naturally appear, showing no disposition to conceal anything, nor any haste to get away with the horse; and they charge his death to exposure, improper treatment, or other cause thereafter arising.

They further claim that, if not then in good condition, the plaintiff, accepting him after full opportunity for examination, thereby waived the defects--such, at least, as were visible. He saw, handled and fed him in the evening and in the morning, and said he was all right. If he did not take him out of the shed before defendant left, it was because he did not see fit to do so. But now he claims that the bad condition was apparent enough when he was taken out very shortly afterward; that his feet, his limbs, his movement and his looks, all visible, plainly indicated it. If these signs had not before been present and patent, the acceptance would not have been a waiver; but being present and patent to observation, the neglect to observe when he had full opportunity can not help him, and he should be treated as though he had observed them. His knowledge that the state of the roads over which the jack had been led was just what the contract recognized to be dangerous to the feet and limbs, especially required that he should examine the feet and limbs for signs of injury.

There was, then, some ground in the evidence for the defense of waiver. This was expressly presented in an instruction asked by defendants, which was not given as asked, but materially modified. We think it faulty in not stating what would constitute an acceptance to make it a waiver, and what defects it would waive.

The modification did not improve it as a legal proposition. It did not attempt to correct the fault here noticed, but materially changed what, with such correction, would have required no change. As asked, the instruction made proof of the acceptance of the jack after full opportunity for examination and delivery of the horse without any false representation by

defendants, an absolute defense; while the modification left those facts, if proved, as circumstances to be considered by the jury in finding their verdict—an idea of the law which we think was mistaken, and may have aided to produce the peculiar verdict found. Having refused to recognize the defense of waiver as presented by the defendants' instruction, the court should have qualified the first one given for the plaintiff, which entirely ignored it.

We are satisfied that a proper presentation of this case must have resulted in a different verdict—finding for the plaintiff with the damages proved, or finding for the defendants—and must so result if properly presented upon another trial.

Reversed and remanded.

JACOB VOGEL

V.

SYLVANUS SHURTLIFF ET AL.

Mortgages—Foreclosure—Inverse Order of Alienation—Waiver of Rule—Contribution—Interest.

The operation of the rule that, as between the grantees of different portions of mortgaged premises, the respective parcels are liable in the inverse order of their alienation, may be waived, limited or modified by the deed to the earliest grantee so as to bind such grantee and those claiming under him.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of DeWitt County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. GRAHAM & MONSON, for appellant.

Messrs. MOORE & WARNER, for appellees.

Vogel v. Shurtliff.

PLEASANTS, J. This case, under the title of Brown and Emery v. Shurtliff, was before us at May term, 1886, and an opinion therein was filed November 20, 1886, [24 Ill. App. 569,] reversing the decree and remanding the cause with directions for further proceedings therein, and afterward also before the Supreme Court under the title of Vogel v. Brown et al., reported in 120 Ill. 338. It will therefore be unnecessary to state here any more of the case than has since transpired.

Being remanded, the cause was further heard pursuant to the directions given on an agreed state of facts, and decree made, finding and decreeing that the complainant (Shurtliff) was entitled to contribution and to be repaid the sum of \$685.66, with interest at six per cent. from January 2, 1882, when his land was sold; that Frank Adkisson was chargeable with one half of said sum, to wit, \$458.27, which should be a lien on his lot three, and his reversionary interest in lot four; that Andrew Hutchin, by his covenants in his deed from Thomas B. Adkisson of lot five and his acceptance of the same, became chargeable with the part of the mortgage debt with which his grantor was personally chargeable (as between the widow and heirs) except \$200 thereof, and that this amounted to \$191.14, which should be a lien on that part of lot five which he had conveyed to Vogel; that Thomas B. Adkisson is chargeable with \$267.14, which should be a lien on his reversionary interest in lot four; and of the costs one-half was charged to lot three, three-tenths to the reversionary interest of Thomas B. Adkisson, and two-tenths to the part of lot five conveyed by Hutchin to Vogel.

The controversy now here, is between the parties holding respectively the several interests upon which Thomas B. Adkisson's portion of the mortgage debt is charged by the decree. Leaving the other portion of that debt out of view, the case may be stated thus: Thomas B. Adkisson mortgaged his lot five and his reversionary interest in lot four, to secure the payment of \$458.27. He then conveyed lot five to Andrew Hutchin, and afterward his reversionary interest in lot four to C. H. Moore. Each of these interests is of sufficient

value to pay the incumbrance in full, and the question is, whether only one, or both, and which, should be charged, and for what proportion of the debt.

There is no disagreement about the rule that, as between the grantees of different parcels of mortgaged premises, their respective parcels are liable in the inverse order of their alienation by the mortgagor, and that it applies also to subsequent purchasers who have notice, actual or constructive. *Ig'chart v. Crane*, 42 Ill. 261; *Vogel v. Brown*, 120 Ill. 338. Appellant having purchased from Hutchin, the earliest grantee of the mortgagor, and succeeded to his rights, claims that, under this rule, the parcel subsequently conveyed to Moore, being the reversionary interest in lot four, should be first charged. But the operation of this rule may be waived, limited, or modified by the terms of the deed to the earlier grantee, which will also bind those claiming under him. *Briscoe v. Powers*, 47 Ill. 447; 2 *Jones on Mortgages*, Secs. 1092, 1620, 1625, and note 4; and the opinions in this case above referred to.

The deed from Thomas B. Adkisson to Hutchin contained, after the description of the lands conveyed, the following provision: "Said land being sold and this deed made and accepted subject to a certain trust deed or mortgage (describing the one here in question, and reciting in substance the provision of the partition decree for the sale of lot one, to pay the incumbrance, and these proceedings). After which ten acres is so sold and the proceeds so applied, then the said T. B. Adkisson shall be bound to further protect said Hutchin to the amount of \$200 against said trust deed and no more, said Hutchin to pay any excess due thereon, over the proceeds of said ten acres and said sum of \$200." The sale of these ten acres did not yield enough to pay off the incumbrance, but left as T. B. Adkisson's share of the deficiency the sum of \$458.27, above stated as the mortgage debt. Appellee Moore, who assigns cross-errors, claims that, under this provision, the operation of the rule was not only waived by Hutchin, but that he assumed to pay, and accepted as a charge upon the lot he purchased, the entire amount of any deficiency that should remain after the application of the proceeds of lot

one, looking only to the personal liability of his grantor for reimbursement to the extent of \$200, if the deficiency should exceed that amount.

We agree that there is room for debate as to the true construction of this provision, but on the whole are inclined to think it was intended to be an absolute assumption by Hutchin of only the excess of such deficiency, if any there should be, over \$200; that as to such \$200 the operation of the rule was not waived, but that, besides whatever protection it might afford, he was to have also that of the personal covenant of his grantor, the mortgagor, which however did not, as to Hutchin, release lot four from the operation of the mortgage and rule. Had it simply subjected the land to the trust deed, the whole of lot five, together with T. B. Adkisson's interest in lot four, would have been liable, *pro rata* for all the deficiency. *Briscoe v. Power, supra*. But it was not so provided. The real agreement is expressed in what follows the reference to the partition decree, and is that Hutchin is "to pay any excess due thereon over the proceeds of said ten acres (lot one) and said sum of \$200." When this deed was made the grantor retained his interest in lot four, which therefore would have been primarily liable for the whole mortgage debt, except as in said deed otherwise provided, and being confessedly of sufficient value would thus have protected the land thereby conveyed. It did otherwise provide; and the expression of Hutchin's obligation to pay the excess of deficiency remaining over \$200, is an exclusion of all obligation to pay the \$200. It further expressly bound the grantor to "protect said Hutchin to the amount of \$200 against said trust deed." As between them we think these provisions amounted to a release of Hutchin's land from the mortgage, to the extent of \$200, and not a mere agreement to repay or reimburse him. He was not to pay it in the first instance, or at all. Moore, who afterward purchased of the same grantor another parcel of the incumbered lands, with notice of the release, can not complain.

In their brief, counsel present a statement of the amounts paid, and by the decree ordered to be paid as charges upon

the several lots and parcels of the mortgaged premises, and claim that the inequality of these amounts show the iniquity of the decree. But the mortgage debt was at first equally and equitably apportioned upon the several interests of the mortgagors respectively. Those who have paid are not here complaining, though their proportion seems to have been larger than that of Thomas B. Adkisson. As between the parties here contesting who claim under him, the inequality results from his agreement with Hutchin, of which Moore had notice when he purchased, and the conveyance of these parcels successively, whereby the one last conveyed became primarily liable for the whole debt, except as otherwise provided by said agreement, which is not inequitable to Moore.

The decree charges Thomas B. Adkisson with interest from the time the bill herein was filed. That was after the deficiency was known to exceed \$200, which, therefore, was then due. Hutchin is in like manner charged with interest from that time. We see no wrong in this; and the costs are imposed in the same proportion.

Decree affirmed.

JOHN M. DEHM

V.

CITY OF HAVANA ET AL.

Municipal Corporations—Purchase of Land for Cemetery—Issue of Bonds—Bill to Enjoin Payment and Cancel Purchase—Statutes—Ordinances and Resolutions—Certificate of Evidence—Practice—Modification of Decree.

In a proceeding to enjoin the payment of certain bonds issued by a municipal corporation, upon the purchase by it of certain lands for cemetery purposes, and to cancel the purchase, it is *held*: That the injunction obtained by the plaintiff in the court below as to the first series of bonds should have been made perpetual, it not appearing that they were returned upon the subsequent and valid issue of bonds for the same purpose; that the ordinance for the purchase of said lands under which the second issue of bonds was made, complied with the statute, and was a valid exercise of municipal author-

Dehm v. City of Havana.

ity; that persons employed by virtue of the resolution authorizing the purchase and the first issue of bonds are entitled to compensation, although the first purchase was invalid, there being a "contingent fund" previously appropriated out of which they can be paid; and that the title to the lands in question, though subsequently acquired, relates back to the time when the labor was performed.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Mason County; the Hon. L. LACEY, Judge, presiding.

Mr. HORACE G. PARKINS, for appellant.

Messrs. R. J. COONEY and JOHN W. PITMAN, for appellees.

WALL, J. By resolution adopted March 5, 1887, the city of Havana (incorporated under the general law) authorized its committee on cemetery to purchase from Reuben A. Henninger a tract of land lying near the city for cemetery purposes, for the sum of \$2,000, and by another resolution adopted March 8th, the mayor and clerk were authorized to issue four city bonds of \$500 each, bearing seven per cent. interest, etc., and deliver the same to said Henninger in payment for said land. It was also resolved that the ground should be surveyed and platted.

On the 15th of April, 1887, the appellant filed his bill in chancery against the appellees setting up the facts of said transaction and alleging that the deed had been received by the city and the bonds exchanged for the same.

The bill sought to enjoin the payment of the bonds and to cancel the purchase. A temporary injunction was obtained and duly served, preventing all steps toward the payment of the bonds or the improvement of the land. It was charged in the bill that the land, containing sixty acres, was largely in excess of any present or prospective need for cemetery purposes, and by reason of its location and quality was unsuitable; but, as seems to be conceded, the real objection was, that at no time before the purchase or the issuance of the bonds,

had the city provided for the payment of a direct annual tax to meet the interest and principal of the debt thus incurred, in pursuance of the provisions of the act in force regulating such municipal corporations. Clause 5, Sec. 62, Chap. 24, R. S. It is not disputed that for the reason last stated said resolutions and bonds were void.

The city being advised of the illegality of its action, passed another resolution on the 30th of April, for the purchase of the land on the same terms, and for the issuance of the bonds as before, with a provision for an annual tax to pay the same, which was designed to be in conformity with said statutory requirements.

On the 20th of May the appellant filed an amendment to the original bill for the purpose of preventing the payment of certain bills to one James Boggs and one John P. Faulkner, for work done by them in surveying said grounds, and a bill to one Benton, who was a member of the city council, for similar work on the premises, charging that there had been no previous order or appropriation for the services rendered by the said persons. On the 9th of May the appellant filed a bill in the nature of a supplemental bill to enjoin the payment of the bonds issued under the resolution of April 30th.

The city being advised that the action taken on the last named date should have been by ordinance rather than by resolution, abandoned the proceedings under said resolution and on the 4th of June, passed an ordinance, No. 36, in supposed compliance with the statute, and also on the same day passed the regular annual appropriation ordinance, which contained provisions for the payment of the interest on the bonds for the first year. The mayor vetoed ordinance No. 36, but on the 2d of July it was duly passed over his veto by a vote of two-thirds of the council, and was then duly published, and was in force on the 18th of July, as was also the appropriation ordinance. On the 19th of July appellant filed his second supplemental bill to enjoin the delivery and payment of the bonds provided for by ordinance No. 36, but obtained no injunction thereon, and on the 20th of July Henninger again conveyed the land to the city and received the bonds provided for in ordinance No. 36.

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On the 1st of August appellant filed his third supplemental bill praying that the deeds and bonds should be declared void, and that the city should be enjoined from levying taxes in payment of the bonds.

At the August term the whole controversy was submitted to the Circuit Court and was disposed of in one general order. The appellees had, on the 9th of May, answered the original bill, and had, on the 14th of May, filed a motion before one of the judges of the circuit, in chambers, to dissolve the injunction previously issued, which motion was overruled, and they had demurred to the second and third supplemental bills. The Circuit Court, by this order, sustained the demurrer to said second and third supplemental bills, (the first supplemental bill of May 9th was abandoned by the appellant,) and as to the original bill and the amendment thereto, which the court considered, upon the answer and certain oral evidence, there was a decree that the complainant should take nothing except as to the Benton account, as to which the injunction was made perpetual. Errors are now assigned which question the propriety of the conclusions thus reached by the Circuit Court.

So far as the original bill and its amendment are concerned, there is no controversy that the relief prayed should have been granted to the extent of canceling the bonds issued under the resolution of March 8th, but it is insisted by counsel for appellee that it is apparent from the record that those bonds had been returned to the city in exchange for bonds issued under ordinance No. 36, and hence there is no occasion to make perpetual the injunction issued as to them.

We are referred to the statement contained in the motion to dissolve the injunction on the 14th of May, to the effect that Henninger had the bonds first issued ready "to be delivered back to the city" whenever the bonds provided for by the resolution of April 30th should be executed and delivered to him. We are unable to find, anywhere in the record, that, as a matter of fact, or even as a matter of reasonable inference, those confessedly illegal bonds were ever surrendered, and, so far as shown by the record, they are yet outstanding. It was, therefore, but right and proper that the injunction

should be made perpetual as to them, and no doubt the omission to do so was through a misconception as to the true state of the record.

This inadvertence is not surprising in view of the confusion occasioned by the frequent change of position, and the consequent change of the pleadings, as above set forth. It is urged that the court erred in not holding invalid the claims of Boggs and Faulkner, for surveying and platting the cemetery grounds, before the city obtained a title. When this work was done the city had a deed from Henninger, and it was by virtue of the resolution of March 8th, that the committee employed these claimants.

The justification for the payment of these bills now suggested is that there was an item in the annual appropriation bill, of the previous fiscal year, for "contingent fund," under which there was a large unexpended sum in the treasury that had been provided for and collected under said appropriation bill and the tax levy ordinance of the same year, and which must be devoted to such expenditures as these.

Whether the provision thus made for a "contingent fund" was as definite and specific as the law requires, we shall not undertake to determine. We think it is sufficient to say that the fund having been provided for by the city and collected from the taxpayer without protest or objection, it is too late now to urge the point for this purpose, nor do we think that the fact that the city had a deed to the property which would, perhaps, or probably, be set aside, is a sufficient reason for refusing payment of these accounts. Whatever may be the logic of the situation, considering only what had transpired when this work was done, we are inclined to hold that a title subsequently perfected should relate back to that period, so as to afford equitable protection to these men whose work has been appropriated by the city, and the benefit of which the city may legally enjoy.

Nor do we feel called upon to consider whether the purchase of the land in question was judicious. That was for the city to determine for itself. It had the power, expressly conferred by clause 79 of Sec. 62, Chap. 24, to acquire lands, by

purchase or otherwise, for a cemetery within or without the corporation. If it be admitted that in case of a palpable and fraudulent abuse of authority in this respect a court of equity would interfere to prevent an improper use of corporate funds, still we see nothing in the facts of the present case to warrant such interference.

It is urged that the certificate of evidence which was heard under the issues made upon the original bill, recites that the cause was heard on the 9th of August, when, as appears of record, the hearing was on the 6th; hence the evidence contained in the certificate can not be considered for the purpose of supporting the decree. This was probably a misrecital as to the date. At any rate it is evident that the testimony was taken on the hearing, whether the true date was the sixth or the ninth.

A point is made that, as appears by the decree, there was a hearing of the suit, whereby the demurrer to the second and third supplemental bills was waived, and therefore it must be supposed that those bills were dismissed on the merits, and there being no evidence to support such a decree of dismissal, there is error in the record.

This proceeds upon an incorrect view of the decree. It is plainly stated in the decree that the court heard the case as to the original bill and the amendment thereto upon the answer to the bill, and upon evidence as to the issue raised by the amendment, and that as to the supplemental bills numbers two and three (number one having been abandoned), the case was heard upon the demurrer to said bills, and the court, upon consideration and argument, held said bills to be insufficient in law.

There was no objection to the mode adopted by the court in disposing of the entire controversy, and while it would have been more in accord with the regular course to have disposed of the demurrer to the supplemental bills before proceeding to try the case upon the original bill, yet this, at most, is but a mere irregularity, which was, no doubt, consented to as a matter of convenience to all, and should occasion no complaint here.

The chief and important question in the case arises upon the demurrer to the second and third supplemental bills, which is as to the validity of the bonds issued under ordinance No. 36. That ordinance provided that a cemetery should be established upon the land described containing sixty acres, etc., offered to the city at the price and on the terms then particularly set forth, which were accepted, and the land was thereby ordered to be acquired and forever used for a cemetery, and that upon a conveyance to the city four bonds of \$500 each should be issued, said bonds to bear interest at the rate of seven per cent. per annum, and respectively mature in two, three, four and five years. They were to be executed by the clerk on behalf of the city and to be delivered to Henninger.

Section two of the ordinance provided that to pay the principal and interest on the bonds as they should mature, the sum of \$2,490 was appropriated out of the city revenues, to be directly and annually assessed and levied upon the taxable property within the city, and to be collected in yearly parts as follows: For the fiscal year beginning in the year 1887, \$140 to pay the interest on all the bonds for the first year; for the fiscal year beginning in 1888 the sum of \$640 to pay the interest on all the bonds for the second year, and the principal of the bond then falling due; and so on specifically with reference to the principal and interest of each of the other bonds, the last payment to be made from the funds raised during the fiscal year beginning in 1891; and it further provided that a certified copy of the ordinance should be filed with the county clerk, who was thereby directed to ascertain the necessary rate per cent. and extend the tax each year, and that the money so to be raised should be collected, and having been collected, should be by the city treasurer applied to payment of the principal and interest on said bonds respectively, as the same should become due and payable.

The annual appropriation ordinance for the fiscal year beginning May 7, 1887, contained an item of \$140 for interest on cemetery bonds, being the amount mentioned in ordinance No. 36.

The city is incorporated under the general law, and must be governed by the provisions thereof. It is urged by appellant

that there has been a failure to comply with Sec. 63, ¶ 5, which relates to the power to borrow money on the credit of the corporation for corporate purposes and issue bonds therefor, and declares that, "before or at the time of incurring any indebtedness (the city) shall provide for the collection of a direct annual tax, sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years after contracting the same."

We are of opinion that this provision has been fully complied with by the terms of Sec. 2 of said ordinance 36, wherein there is expressly enacted all that is required by the letter as well as the spirit of the statute. As we read it nothing has been omitted.

It is also argued that there is a failure to comply with ¶ 90, (Sec. 2 of Art. 7 of the same Chap. 24) which provides that the city shall, within the first quarter of each fiscal year, pass an ordinance to be termed the annual appropriation bill, in which such sums as may be deemed necessary, etc., shall be appropriated, specifying the objects and purposes and the amount for each; and no further appropriation shall be made at any time during that fiscal year, unless specially authorized by a majority of the legal voters through a petition signed by them, or at an election.

It has been stated that the annual appropriation bill for the fiscal year beginning May 7, 1887, contained an item of \$140 for the first year's interest on the bonds. Nothing more is necessary for that year, and as we conceive, there has been a full compliance with this provision, even conceding that this section is applicable to bonded indebtedness created and provided for pursuant to ¶ 5 of Sec. 63.

Counsel for appellant urge also, that ¶ 92 (being Sec. 4 of Art. 7), Chap. 24, has been disregarded. It provides that "no contract shall hereafter be made by the city council * * * and no expenses shall be incurred * * * whether the object of the expenditure shall have been ordered by the city council * * * or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided." The argument is that

the contract in this case was made when, by ordinance 36, the proposition of Henninger was accepted, and that there was then no appropriation ordinance in force. The contract which it is sought to set aside in this case consists of the bonds which were in fact not issued until the 20th of July, which was two days after the ordinance 36 and the annual appropriation bill were in force by publication, so that if it be conceded this section applies to a bonded indebtedness payable beyond the current year, issued and provided for under ¶ 5 of Sec. 63, still there is no failure to comply with this requirement.

It is argued on behalf of appellees that when a debt is incurred and provided for under said ¶ 5, it is not subject to the requirements of ¶ 90 and ¶ 92; that ¶ 5 is complete in itself and when its terms are complied with, there is no necessity to regard the requirements of 90 and 92, which are applicable merely to current yearly expenditures.

It might happen in many instances that compliance with all these provisions would be impossible, *e. g.*, where a purchase is made and bonds issued after the passage of the annual appropriation bill containing no clause or item touching the subject. In such case, if the construction contended for by appellant is correct, the city, though having a chance to make a favorable arrangement, could not avail of it until after the passage of the next annual appropriation bill, whereby the authority conferred by ¶ 5 would become conditional and contingent in every instance upon the possibility of complying, not only with its provisions, but also with ¶ 90 and ¶ 92, thus superadding a qualification by construction, not found in or suggested by the language of the paragraph.

There is great force in the argument thus presented, but we do not find it necessary to pass upon it in view of the peculiar facts of this case, by which there is a compliance with all these provisions.

Considering the whole case we see nothing to which valid exception may be taken, aside from the omission to declare void the bonds issued under the resolution of March 8, 1887.

Goff v. T., St. L. & K. C. R. R. Co.

The decree is hereby so modified as to declare said bonds invalid and the injunction will be made perpetual as to them. In all other respects the decree will be affirmed. Each party will pay his own proper cost in this court.

Decree modified and affirmed.

WILLIAM H. GOFF

v.

THE TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD
COMPANY.

28	529
146s	626

Master and Servant—Railroads—Agent—Liability of Master for Acts of—Scope of Authority—Volunteers—Defective Rope—Pleading—Surplusage.

1. It *seems* that the agent of a railroad company sent to the scene of an accident in charge of a wrecking crew, has the implied authority to employ additional assistance, if, in his opinion, it is necessary.

2. The law will infer knowledge of defects in machinery and appliances provided by a master for the use of his employes, when, by the exercise of ordinary care on his part, he might have discovered the same.

3. In an action brought to recover for injuries suffered through the use of a defective rope, it is *held*: That the second count of the declaration states a cause of action; and that it is not rendered defective by surplusage in the nature of an argument.

[Opinion filed May 25, 1888.]

IN ERROR to the Circuit Court of Coles County; the Hon. JAMES F. HUGHES, Judge, presiding.

MESSRS. CRAIG & CRAIG and A. J. FRYER, for plaintiff in error.

MESSRS. WILEY & NEAL, for defendant in error.

Both counts are based upon the theory that an employer is bound to furnish his servants with materials and appliances

that are safe in any event. "Such is not the law. He is in no sense a guarantor of their fitness or safety. The law imposes upon the employer only the obligation to use reasonable and ordinary care and diligence in providing suitable and safe machinery and materials."

"Knowledge of the deficiency must be brought home to the employer, or such a state of facts must appear as would make it his duty to have had such knowledge." Price et al. v. Henagan, 5 Ill. App. 234; L. C. R. R. Co. v. Jones, 11 Ill. App. 324; Shearman & Redfield on Negligence, Secs. 92, 100; C. & I. Ry. Co. v. Troesch, 68 Ill. 545; Camp Point Manfg. Co. v. Ballou, 71 Ill. 417; Penn. Co. v. Lynch, 90 Ill. 333; City of Rockford v. Tripp, 83 Ill. 238.

Neither count avers that the defendant had any notice that the rope was defective. Nor does either count aver any such state of facts as would make it the duty of defendant to know.

WALL, J. The Circuit Court sustained a demurrer to the declaration, and rendered judgment against the plaintiff for costs. The only question is, whether a cause of action was well stated in the declaration or either count thereof. The second count alleged, in substance, that the defendant was a railroad corporation operating a railroad, etc.; that a wreck occurred on the road, by which the track was obstructed, and that defendant sent its machinery, ropes and other appliances in charge of its agent and employes to clear the track; that it was the duty of defendant to furnish safe ropes, machinery and appliances for said purpose, but that it negligently furnished unsafe and insufficient ropes, and could have had notice of the unsafe condition of the ropes, but negligently and carelessly failed to use proper care and diligence to ascertain the same; that one of said ropes was attached to a car, being a part of the wreck, and that the laborers in charge of defendant's said agent were required to pull on said rope, but they being unable to move the car on which they were so pulling, the said agent of defendant ordered the plaintiff to take hold of the rope with said laborers and assist in the removal of the car, and the plaintiff did accordingly lay hold of the

rope, using due care and diligence, and with the said laborers under the command of said agent pulled on said rope, which, in consequence of its being unsound, broke, and gave way, whereby the plaintiff was thrown down and his leg broken. We think this count substantially good.

If the question were as to the liability of the defendant to pay for services so rendered by plaintiff, in assisting to remove the wreck, we would answer it in the affirmative.

The agent thus sent out in charge of a wrecking crew would have had apparent authority to do what was necessary for the purpose in hand, and if there was need for another man or two in aid of the force at his disposal, it would be within the scope of his authority in such an emergency to employ such needed assistance, and it may therefore be assumed that the plaintiff occupied the same position as the other laborers and had the same legal rights. If the service was rendered gratuitously he would be no worse off; indeed, in such case he might well insist upon a stricter measure of liability, not unlike that of a gratuitous bailee. But regarding the parties as occupying the relation of master and servant, it was the duty of defendant to have used all reasonable and ordinary care to provide safe appliances, and the law will imply and infer notice of any defect which, by the use of ordinary care, might have been known to the master. Plaintiff might well suppose proper care had been used. Now, the allegation here made is that the defendant negligently furnished unsafe and insufficient ropes and neglected to use proper care to ascertain the condition thereof, though such fact might have been so ascertained. This is in effect a statement of a breach of the duty which the law devolves upon the master in this respect. It is true, the declaration also alleges it was the duty of the defendant to furnish safe ropes, etc., and it is urged that this is an allegation which would make the master absolutely liable as an insurer of the safety of the appliances furnished. This allegation is merely the pleader's argument, and might have been wholly omitted without impairing the pleading. While it is unnecessary, it does not render the declaration defective.

Utile, per inutile non vitiatur. But, construing it with the

other allegations above quoted, it amounts to no more than the usual averment of the duty and liability arising upon the facts alleged. Assuming that plaintiff was justified in responding to the request made by the agent of defendant, and that, as alleged, he exercised due care in doing so, a cause of action is made out. The judgment will be reversed and the cause remanded.

Reversed and remanded.

ALEXANDER T. MILLER ET AL.

V.

SARAH A. KINGSBURY.

Administration—Action of Debt on Bond—Parties—Surviving Partner—Pleading—Practice—Evidence—Damages—Measure of.

1. The legal right of action on a bond running to an administratrix for the benefit of the estate, is in such administratrix in her individual capacity.

2. In general, the action must be brought in the name of the one in whom the contract vests the legal interest. When the contract is under seal, the action must be in the name of the obligee, though the agreement be for the benefit of another.

3. The measure of damages upon the breach of an undertaking faithfully to discharge the duties of a surviving partner, is the amount which would have been received in case of performance.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

Messrs. J. F. CARROT and J. H. WILLIAMS, for appellants.

A default simply admits the cause of action as laid in the declaration, and when the damages rest in computation, as when the amount of the debt is fixed by the instrument sued on, the plaintiff need not prove the execution of the instru-

ment, but the damages may be assessed upon the production of the instrument; but even then the instrument must be produced. Tidd's Practice, Vol. 1, 578; Greene v. Hearne, 3 T. R. 301; 1 Suth. on Dam., 774, note; Roscoe, Ev. (10th Ed.), 71; Meyer v. Phillips, 72 Ill. 460; McKenzie v. Penfield, 87 Ill. 38.

But when there is anything necessary outside of the instrument sued on, in order to fix the amount of damages, a default does not admit anything more than the cause of action, and the amount of damages must be proved.

MR. WILLIAM McFADON, for appellee.

The question in this case is not as to the person to whom the money sued for upon the bond in controversy shall be paid when collected. Chadsey, Adm'r, v. Lewis, 1 Gilm. 153; Manlove v. McHatton, 4 Scam. 95.

The simple question is, has the suit been brought by the party in whom the legal interest is vested? Lovejoy v. Steel, 18 Ill. App. 281; 1 Chit. on Plead., p. 2; Newhall v. Turney, 14 Ill. 339; Larned v. Carpenter, 65 Ill. 544.

The instrument being a bond under seal, the obligee is the proper party to sue upon it. 1 Chitty on Plead., 3, 4; Saunders v. Filley, 12 Pick. 554; Johnson v. Foster, 12 Met. 167; Mellan v. Baldwin, 3 Gray, 486.

In the case of the bond in suit, the legal interest is clearly in Sarah A. Kingsbury. 1 Chit. on Plead., 2-4, and cases cited.

This is true though the promise is to Sarah A. Kingsbury, administratrix, and her successor or successors in office, the test of the truth of this proposition being that, in the event of her death, not her successor in office, but her executor or administrator, would have to bring suit for a breach of the condition. Stevens v. Hay, 6 Cush. 230, and many cases cited; Lovejoy v. Steele, 18 Ill. App. 283, and cases cited.

The promise in the case at bar is to Sarah A. Kingsbury, administratrix (not as administratrix), and the words "administratrix, etc.," are *descriptio personæ*, and may be rejected as surplusage. Newhall v. Turney, 14 Ill. 338; Jeffries v. McLean, 12 Mo. 540; Bradley v. Graves, 46 Ala. 277.

The duty of a surviving partner to settle the copartnership business and pay off the firm debts exists independently of any action of a court, but the County Court has full power to enforce the duty. *Miller v. Jonas*, 39 Ill. 60; *McKean v. Vick*, 108 Ill. 375; *Nelson v. Hayner*, 66 Ill. 492; Rev. Stat. 1874, Chap. 3, Sec. 89.

The bond in this case being for performance of a certain thing, viz., the faithful discharge of the duties of a surviving partner, the measure of damages in the case is the value of the performance. 2 Suth. on Dam., 611; *Lewis v. Crockett*, 3 Bibb, 197; *Robertson v. Morgan*, Adm'r, 3 B. Mon. 307; *Cannon v. Cooper*, 39 Miss. 384; Rev. Stat. 1874, Chap. 3, Secs. 85, 89.

WALL, J. The appellee brought an action of debt upon a penal bond against the appellants.

A demurrer to the declaration was overruled and the defendants abiding by their demurrer, the damages were assessed at \$1,818.47. Judgment was rendered accordingly from which an appeal is prosecuted to this court.

There are nine different assignments of error, which, in substance, raise the points that the declaration was not sufficient; that the court erred in assessing the damages at the amount stated, in overruling the motion in arrest and in rendering final judgment.

The bond was given by appellants pursuant to an order of the Circuit Court of Adams county entered in a certain suit in chancery brought by appellee, administratrix of Albert B. Kingsbury, deceased, against appellant, Alexander T. Miller.

Albert B. Kingsbury, deceased, and the said Alexander T. Miller were partners up to the death of said Kingsbury, and, as shown by the recitals of the bond, the object was to secure the faithful performance of the duties devolving on the surviving partner. The condition of the bond relied on in the present suit was in these words: "Now, therefore, if the said Alexander T. Miller shall faithfully discharge his duties as the surviving partner of the late firm of Miller & Kingsbury, composed of the following members, to wit: said Albert B.

Miller v. Kingsbury.

Kingsbury, deceased, and said Alexander T. Miller, the said Alexander T. Miller being the surviving partner of said Albert B. Kingsbury."

By way of assigning a breach of this condition, it was alleged that, after the execution of the bond, the said Miller reported to the County Court that he had in his hands over and above all outlays the sum of \$3,772.59, and was ordered by said court to pay to the outside creditors of the firm, as shown by the schedule, forty per cent. upon their respective claims within one day from the date of the order, and that he pay out the residue, *pro rata*, within ten days; that although he paid out the forty per cent. he neglected and refused to pay the proper *pro rata* of the residue to one of the named creditors, the First National Bank of Quincy, although requested, etc.

The main objection taken to the declaration below seems to have been that the suit was not brought by the plaintiff *as* administratrix.

The undertaking was with appellee after the death of her intestate, and while she is described as Sarah A. Kingsbury, administratrix of the estate of Albert B. Kingsbury, deceased, the latter words are mere *descriptio personæ*. The agreement was with her in her individual capacity, and while the benefit of whatever she might recover would inure to the estate and its creditors, yet the legal right of action was hers. She was, therefore, the proper person to bring the suit.

We are of opinion the cause of action was alleged with sufficient technical accuracy. Had the promise been made to the deceased, it would have been proper to declare as administratrix; but as it was made to the plaintiff, although on account of, and in respect to, the estate in her charge, it was proper to lay the demand in her individual capacity. 2 Williams on Executors, Chap. 2; Newhall v. Turney, 14 Ill. 338.

In general, the action must be brought in the name of the party in whom the legal interest is vested by the contract, and when the contract is under seal the action must be in the name of the obligee, though the agreement may be for the benefit of another. 1 Ch. Pl. 2, 4; Ganzert v. Hoge, 73 Ill. 30;

Moore v. House, 64 Ill. 1 '2. The declaration was good and the court properly overruled the demurrer.

So far as the condition upon which the breach is assigned was concerned, there was not occasion to wait for an order of the Circuit Court. Had the breach been assigned upon another condition contained in the bond for an accounting with the plaintiff, after the payment of partnership debts, it may be that the phraseology of that condition would require such an order.

The most important question is as to the measure of damages. The undertaking was to faithfully discharge the duties of Miller, as surviving partner.

He agreed to do this and failed. Because of this failure, the estate is liable to pay to the creditors the amount not paid by the surviving partner. This was not a mere contract of indemnity, but it was an absolute agreement to discharge a specified obligation, and it would seem clear that the true measure of damages, whether we consider the creditor, who would have received the money, or the estate, which must now pay it, is the value of the contract if it had been performed. 2 Sutherland on Damages, 611, and cases there cited.

The demurrer admitted all the facts well pleaded, and we think the *data* were so clearly alleged that the court might well have assessed the damages, except that perhaps it was necessary to prove when the demand was made from which time interest was computed.

As to all else, there was no occasion for any oral or other evidence. The testimony which the court heard was mainly to the identification of the various matters alleged in the declaration and admitted by the demurrer. Mass. M. Life Ins. Co. v. Kellogg, 82 Ill. 614.

The appellants suffered no injury by the action of the court in this respect.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

DAVID A. WATTS
V.
LAFAYETTE McLEAN.

Mandamus—Judgment against School District—Authority of Treasurer—Secs. 49 and 67, Chap. 122, R. S.—Amendment—Demurrer.

1. School officers possess only such powers as are directly granted by statute, or result by fair implication from those so granted.

2. In the absence of an order by the directors or a court of competent jurisdiction for the payment of school funds, the treasurer of a district can not be required by *mandamus* to pay a judgment against such district from funds collected under a special levy for that purpose.

3. A copy of a special levy by school directors, merely certified by the clerk of the trial court, is no part of the record.

4. Where a demurrer to a petition for a *mandamus* is overruled and judgment rendered for the petitioner, this court can consider the petition only in the light of its averments.

[Opinion filed May 25, 1888.]

IN ERROR to the Circuit Court of Clark County; the Hon. J. W. WILKIN, Judge, presiding.

Messrs. BELL & GREEN, for plaintiff in error.

Sec. 49, Chap. 122, R. S., provides the only means for the collection of a judgment against a board of school directors, and it has been frequently passed upon by the courts of this State.

In *Botkin v. Osborne*, 39 Ill. 101, the Supreme Court, after quoting Sec. 49, say: "This is the only mode provided by law for enforcing judgments in such cases."

In *Thomas v. Urbana School District*, 71 Ill. 283, the court again quotes Sec. 49, and say: "By the enactment of this section the Legislature provided the mode by which a party having a claim against a board of directors could enforce its collection. If the plaintiff has a claim against the Board of Education, he must proceed according to this statute."

In *Board of Education v. Neidenberger*, 78 Ill. 58, the court again refers to Sec. 49, and say: "Here is a sure and complete remedy given for the enforcement of all just claims against such bodies. The party has but to obtain his judgment, and, if there be money in the treasury, to obtain an order on the treasurer for its payment, and if there is no money applicable to its payment, then to obtain a writ of *mandamus* to compel the levy and collection of a tax for its payment." See also *Watson et al. v. Abry*, 9 Ill. App. 280.

The law prohibited the payment of the money by Watts, without an order drawn by the school directors, as required by Sec. 67, and there is no averment in the petition that any such order was presented to Watts, when demand of payment was made. The evident purpose of joining the school directors with the treasurer in the mandatory writ provided for in Sec. 49, is that they may draw the order provided for in Sec. 67. Without such order no money can be legally drawn out of the treasury.

Mr. E. CALLAHAN, for defendant in error.

WALL, J. This was a petition for *mandamus* by the plaintiff in error against the defendant in error, brought in the Circuit Court of Lawrence county to the February term, 1887, at which term the venue was changed to the Circuit Court of Clark county.

The cause having been transferred to the latter county, it came on to be heard at the April term, 1887, upon a demurrer to the petition. The demurrer was filed in the Circuit Court of Lawrence county, before the venue was changed; but it would seem, as is stated in the abstract, that the defendant did not appear in Clark county, and that the demurrer was not argued on his behalf. The demurrer was overruled and judgment was rendered according to the petition with costs.

The only question now arising is whether the petition contains such allegations as to warrant the relief therein sought. It alleges that at the — term A. D. 18—, the petitioner recovered a judgment in the Circuit Court of Lawrence county,

Watts v. McLean.

for \$179.78 and costs of suit, against the school directors of District Number one, Township Number five, North, etc., in said county, which is wholly unsatisfied. That said defendants (the school directors), afterward levied a tax on the taxable property in their district, for the express purpose of paying said judgment; that the tax so levied was extended, etc., and that of the tax so levied the sum of \$131 was collected and was paid over to the defendant in the petition (plaintiff in error), as treasurer of said township, prior to January 1, 1887; that after the said sum so collected was paid over to said defendant treasurer, the petitioner demanded of him that he pay the same to him in part payment of said judgment, but that said defendant, so being such treasurer, refused to pay the same over to petitioner, wherefore petitioner prayed that by writ of *mandamus* the said defendant might be peremptorily required to pay to petitioner the said sum of \$131 in part payment of said judgment.

It is provided by Sec. 49, Chap. 122, that "If judgment shall be obtained against any township, board of trustees, or school directors, the party entitled to the benefit of such judgment may have execution therefor as follows, to wit: It shall be lawful for the court in which such judgment shall be obtained, or to which such judgment shall be removed by transcript or appeal from a justice of the peace, or other court, to issue thence a writ commanding the directors, trustees and treasurer of such township to cause the amount thereof, with interest and costs, to be paid to the party entitled to the benefit of said judgment, out of any moneys unappropriated of said township or district, or if there be no such moneys, out of the first moneys applicable to the payment of the kind of services or indebtedness for which such judgment shall be obtained, which shall be received for the use of such township or district, and to enforce obedience to such writ by attachment, or by *mandamus*, requiring such board to levy a tax for the payment of said judgment, and all legal process, as well as writs to enforce payments of a judgment, shall be served either on the president or clerk of the board."

The Supreme Court have repeatedly held that this is the only mode of enforcing a judgment against a school district.

Botkin v. Osborne, 39 Ill. 101; Thomas v. Urbana School District, 71 Ill. 283; Board of Ed. v. Neidenberger, 78 Ill. 58.

By Sec. 67 of the same act, it is provided that funds in the hands of the treasurer shall be paid out on the order of the directors of the district. The Supreme Court, in passing upon the powers of school officers, have said that they possess only the authority granted by statute and such as may result by fair implication from what is granted, and have shown a clear purpose in defining these powers to construe them strictly. This is in accord with the plain policy of the statute and is essential to the protection of the school fund. Glidden v. Hopkins, 47 Ill. 526; Newell v. School Directors, 68 Ill. 514; Peers v. Board of Education, 72 Ill. 508.

The treasurer is not authorized to pay out the money in his hands until an order drawn as required by the statute is presented, or until a court of competent jurisdiction shall have made an order for that purpose, in pursuance of Sec. 49 above quoted. Hence, in this case, unless one of these things had been done, this treasurer was justified in declining to pay upon the demand made by the judgment creditor, and of course, if it was not his duty to comply with that demand he can not be subjected to the cost and vexation of a proceeding by *mandamus*.

It is not averred in this petition that a mandatory order had been obtained upon this judgment. It is merely averred that there was a judgment and that a special tax had been levied to pay it, the proceeds of which levy were in the hands of the treasurer; but there is no averment that an order had been issued by the directors upon the treasurer. The treasurer had no power or authority to pay the money upon the judgment merely because he may have supposed or known that it was collected for that purpose, and he was clearly right in refusing to pay it without an order. He may insist upon a proper voucher when he pays.

Counsel for defendant in error seem to concede all this by their agreement, in which they insist that the mandatory order under Sec. 49 had been issued, and that the tax had been

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levied in obedience thereto, and they have caused the clerk to certify to a copy of the levy made by the directors, being one of the files of the case, which would seem to indicate that there had been such an order. The paper thus certified is not made a part of the record by bill of exceptions or otherwise and is not properly before us.

It is urged that, as appears by the record, the court heard evidence after overruling the demurrer, and it must be presumed there was ample support in the proof thus presented for the judgment that followed. Of course we can consider the petition in the light of its averments only, and it can not be aided by any presumptions of the sort suggested.

It is not presumable that the case was any better than as stated by the pleader, or that any evidence was offered or in existence not within the substantial averments of the pleading. It is suggested by plaintiff in error that the date of the judgment may be very important; that the blanks in the petition should be filled so that it may appear whether the judgment is or is not barred by lapse of time. We think there should be an amendment in this respect, though this would not make the petition good if there has been no mandatory order as required by Sec. 49.

For the reasons indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

DAVID A. WATTS ET AL.

V.

JAMES H. STOLTZ ET AL.

28	541
107	818

Injunctions — Dissolution—Damages — Suggestion of School Tax — Change of Venue.

1. Upon a bill to enjoin the collection of a certain school tax, it is *held*: That the order changing the venue to another county, though very in-

formal, was sufficient; and that, in the absence of anything to the contrary, it will be presumed that the original files were duly transmitted.

2. To sustain an allowance for damages upon a dissolution of an injunction, the evidence should be preserved in the record or the decree should contain such a recital of the proofs as to justify such allowance.

[Opinion filed May 25, 1888.]

IN ERROR to the Circuit Court of Clark County; the Hon. J. W. WILKIN, Judge, presiding.

MESSRS. BELL & GREEN, for plaintiffs in error.

MR. E. CALLAHAN, for defendants in error.

WALL, J. This was a bill in chancery, filed in the Circuit Court of Lawrence county, by the plaintiffs in error, against a part of the defendants in error, to enjoin the collection of a certain school tax. A writ of injunction was obtained on filing the bill. The defendants in error who were not made defendants in the bill as originally filed, were, on their own application setting up an interest in the subject of the controversy, allowed to come into court as defendants and answer the bill. At the August term, 1886, of the Lawrence Circuit Court, the venue was, by agreement, changed to Clark county, and at the term of court in the latter county held in October of the same year the cause was heard and the bill dismissed.

- A suggestion of damages on account of the improper issuance of the injunction was then presented to the court, but the hearing of this matter was not had until the April term, 1887, when damages were assessed at \$57.50.

It does not appear that the plaintiffs in error, or the original defendants to the bill, followed the case to Clark county, and the action of the court in hearing the case was at the request of the other defendants to the bill.

It is now assigned as error, first, there was no order of the Circuit Court of Lawrence county changing the venue to Clark county. The order relied upon is in these words: "And

afterward, to-wit, on the seventh day of the term came again the parties herein, by their solicitors, and by agreement a change of venue was taken to Clark county, Illinois, and the clerk was ordered to transmit papers in the case." This is certainly a very informal entry for such a purpose, but it was the order of the Circuit Court of Lawrence county, and its purport and meaning can not be misunderstood. We regard it as sufficient.

It is assigned as error, second, that the Circuit Court of Clark county erred in taking jurisdiction, for the further reason that there is nothing in the transcript sent by the clerk of the court in Lawrence county to show that the papers transmitted were the original files of the court in the case. There is nothing in the certificate to show that any papers were so transmitted, but it is evident that the papers in the case came to the hands of the clerk of the court in Clark county, and it is to be presumed this was done in the mode required by law. The statute does not, in terms, require any particular certificate by the clerk of the county from which the case is sent, that the papers transmitted are the original papers, but the usual practice is to do so and to refer to them by such description as will identify them.

It was the duty of all parties interested in the case to follow it to Clark county, and if there was any want of a certainty in the certificate, or any failure to forward all the files, the orders necessary to obviate the trouble would have been promptly made. It is not suggested that the papers were not all sent, but that it does not appear that they were.

We will presume that the duty of the clerk of the Lawrence Court was properly performed, the law not requiring any particular evidence of the performance, and there being no reason to infer to the contrary.

It is also assigned as error, that there was no written suggestion of damages filed in the Circuit Court of Clark county. This objection is obviated by an amendment to the record filed in this court at the instance of defendants in error, from which we find that there was a formal suggestion which had been filed in the case before it left Lawrence county, and which

was filed in Clark county on the 15th of October, 1886. The certificate of the Circuit Court of Lawrence bears date October 14, 1886. The hearing of the cause resulting in the dismissal of the bill and a motion for assessment of damages occurred on the 29th of October. The October term of the Clark Circuit Court, 1886, began according to law on the third Monday, being the 18th day of the month.

We think there is no such defect in the record as should work a reversal of the decree for the reasons thus far considered.

It is, however, objected that the evidence upon which the damages were assessed is not preserved. This is met by the suggestion that the findings of the court contain all that is necessary, in this respect, by way of recital.

The recital is that the court finds, after hearing the evidence, "that said defendants have sustained damages by reason of the wrongful suing out of the said injunction, by said complainants, in the sum of \$50 for their solicitors' fees, and in the further sum of of \$7.50 for personal expense of the solicitors of said defendants, while engaged in and about the business of procuring the dissolution of said injunction."

This is merely the conclusion of the court upon the evidence offered, but it does not amount to such a recital of the proof, as that it can be determined whether the conclusion reached was a proper one.

In the case of Albright v. Smith, 68 Ill. 184, the Supreme Court say: "Merely showing that the court heard evidence without showing what facts are proved, leaves us quite as much in the dark as we would have been, had the record merely shown the amount which was ordered to be paid. The record should show that the amount assessed as damages was authorized by the facts proved;" and the court referred to Goodwillie v. Millimann, 56 Ill. 525, where it was said in reference to fees in partition cases that, "as a rule of practice the evidence upon which such an allowance is made should be preserved in the record. Where such large sums are allowed and the rights of litigants are likely to be so materially affected, they should not be deprived of having the decree reviewed in an appellate court."

Boyer v. Sherer.

So in *Spring v. Collector, etc.*, 78 Ill. 107, where an allowance of \$200 for solicitor's fees was under consideration, the court say: "The evidence upon which the allowance was made was not preserved in the record, without which, as this court has frequently ruled, the decree can not be supported, and the recital here in the decree that the finding of the court was on evidence heard without showing what facts were proved was insufficient in this respect." The Supreme Court have been disposed from the beginning to supervise with care these assessments of damages, and have enforced with uniform strictness the rule stated.

The record before us does not contain such a recital of evidence or such a finding of facts as enables us to determine whether the conclusion reached was proper or not, and under the practice as settled by the decisions above referred to, *Jevne v. Osgood*, 57 Ill. 340, and others of like effect, we feel compelled to reverse so much of the decree as relates to the assessment of damages. The decree dissolving the injunction and dismissing the bill is affirmed, but the decree entered at the April term, 1887, assessing damages, will be reversed and the cause will be remanded for further proceedings in that behalf. The costs in this court will be equally divided, each party to pay one half.

Affirmed in part and reversed in part.

JOHN F. BOYER
V.
HATTIE C. SHERER.

Breach of Promise of Marriage—Evidence.

In an action for breach of promise of marriage, this court reverses the judgment for the plaintiff, the verdict being unsupported by the evidence.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Edgar County; the Hon. C. B. SMITH, Judge, presiding.

MESSRS. SELLAR & DOLE, HENRY S. TANNER and ROBERT L. MCKINLAY, for appellant.

Mr. HORACE S. CLARK, for appellee.

CONGER, P. J. This was a suit in assumpsit, for the alleged breach of a marriage contract. Appellee recovered a verdict for \$1,000, upon which judgment was rendered, and appellant brings the case to this court for review.

Appellee was a married woman up to December 11, 1882, when she procured a divorce in Terre Haute, Indiana, where she then lived. On or about the 20th of December, 1882, she, at the solicitation of appellant, removed to Kansas, in Edgar county, the home of appellant, and lived in a house furnished by him until the fall of 1886, when appellant was married, and on the 2d day of September, 1886, this suit was instituted. Appellant and appellee were criminally intimate from some time in 1881, until a short time before appellant's marriage in the fall of 1886.

They contradict each other flatly as to the alleged contract of marriage, appellee testifying that it was originally made prior to her divorce in December, 1882, and renewed from time to time afterward, while appellant positively denies that such a contract was ever entered into by him.

The evidence offered by appellee as tending to corroborate her story is principally contained in a large number of letters written her at various times from 1882 to 1886 by appellant. We have carefully read this correspondence. It is so foul and disgusting, so full of hypocritical cant, lechery and lust, as to convince us that instead of tending to prove a desire for honorable marriage, it but expresses the impure desires of one toward his mistress, and it is difficult to understand how appellee could have regarded it in any other light. Certainly no woman who had the proper respect for herself, would for one moment rely upon such letters as appear in the record, as

Moore v. Sweeney.

showing an honorable and upright purpose upon the part of the writer.

She also introduced two of her own letters written to appellant just before his marriage, but after she knew it was to take place, and in them, while she seems to regret that their relations are to terminate she makes no objection to his marriage, nor intimates that he is in any way bound to her. There is, besides, the testimony of some of the neighbors as to admissions of appellee, which tend to contradict her story.

After a careful consideration of the evidence, we are of opinion it did not warrant the jury in finding that a contract of marriage existed between the parties, and we think the case should have been submitted to another jury.

The judgment of the Circuit Court will therefore be reversed and the cause remanded.

Reversed and remanded.

CLIFTON H. MOORE, ADMINISTRATOR, ETC.,

V.

PETER T. SWEENEY, ADMINISTRATOR, ETC.

Administration—Proposition of Law—Sec. 42, Practice Act—Widow's Award—Waiver—Former Adjudication.

1. An indorsement by the court upon a proposition of law submitted, which amounts to a refusal to consider the same, sufficiently complies with Sec. 42 of the practice act.

2. A creditor of a deceased widow can not, in order to collect his debt, institute proceedings to have her award in the estate of her husband set off, she having used the entire estate without asserting such right.

3. Where a widow, appointed executrix of her husband's estate and made his sole devisee, has failed to administer and has sold the property, used the proceeds and removed to another State, her creditors can not claim the widow's award. Such acts amount to a waiver thereof.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of DeWitt County; the Hon. CYRUS EPLER, Judge, presiding.

MESSRS. MOORE & WARNER, for appellant.

MR. P. T. SWEENEY, for appellee.

PLEASANTS, J. The material facts in this case are as follows: Isaac Loucks died at Clinton, De Witt county, June 25, 1879, leaving a will by which he devised and bequeathed all his property of every kind to his wife, Larney Loucks, and appointed her sole executrix, requesting that she be not required to give a bond or file an inventory as such. He left no minor child. The property consisted of household furniture of value not exceeding \$50, and the homestead lot eight, in block one, of Madden's First Addition to Clinton. On May 15, 1882, the widow presented the will for probate and it was admitted, but she never took out letters testamentary. On that day she executed to William Bishop a mortgage, doubtless intended to cover the homestead, but describing it as lot one in block eight, to secure the payment of \$179.80, and on June 28, 1883, conveyed it absolutely, by warranty deed, with the proper description, to Huldah Rasback, who conveyed to S. F. Lewis. Having also converted to her own use all of the personal property without taking a step further toward administration, she removed to the State of New York, and there died about April 15, 1884, intestate.

In December, 1884, upon petition of appellee as a creditor of Isaac Loucks, letters of administration with the will annexed were granted by the County Court of De Witt county to John J. McGraw, and after due presentation and allowance of his claim for \$501, a petition was filed for leave to sell the real estate mentioned to pay it, making said Bishop and Lewis, and the tenant of Lewis, who was then in possession, parties defendant. Bishop and Lewis answered, and on hearing the proofs the County Court dismissed the petition. On appeal to the Circuit Court, this order was set aside and a decree entered in accordance with the prayer of the petition; which

judgment was by this court affirmed. *Lewis v. McGraw*, 19 Ill. App. 313.

Bishop then procured the appointment of appellant as administrator of the estate of Larney Loucks. Letters issued March 4, 1886.

About this time McGraw died, and appellee was duly appointed administrator *de bonis non* in his place, who thereupon sold the homestead under the decree of the Circuit Court, affirmed as above stated, to Edward J. Sweeney for \$260, and made report of the same to the Circuit Court, which was approved.

Appellant, as administrator of the estate of Larney Loucks, presented his petition to the County Court for the appointment of appraisers to appraise, allow and set off to him as administrator, the widow's allowance in the estate of Isaac Loucks, or the value thereof. Appellee answered and resisted this petition, but the County Court granted it, and appointed the appraisers, and the Circuit Court, on appeal, affirmed the order. A further appeal to this court was prayed and allowed, but not perfected. The appraisers estimated the personal property at \$32.75, and fixed the amount of the widow's award at \$700. Appellant, on leave granted, amended the claim he had previously filed, by raising it from \$600 to \$700, and, the court having approved the appraisers' report, selected the personal property, inventoried at the appraised value, and elected to take the residue, \$667.25, in money. Relinquishment and selection filed March 7, 1877.

Appellee then moved to strike the relinquishment and selection from the files, and filed objections to the allowance of the widow's award and appellant's claim thereto against the estate of Isaac Loucks, for the same reasons, in substance, which he had set forth in opposition to the appointment of the appraisers. The motion and objections were overruled, and judgment was entered for appellant for the amount he had elected to take in money, as a claim of the second class, to be paid by appellee in due course of administration. From this judgment an appeal was taken, and on trial thereof without a jury (by agreement of the parties), the Circuit Court

found the issue against the claimant, refused a new trial, and entered judgment disallowing the claim. From that judgment this appeal is taken.

Appellant makes two technical points. First, that the court refused to mark a certain proposition of law submitted by him either as "held" or "refused," but indorsed thereon a statement that it "did not consider and pass upon said proposition because it did not include and was not based on the leading facts upon which the case was tried." Although not a literal compliance with the terms of the practice act, this indorsement clearly shows that the court did consider and pass upon it, and did refuse it as inapplicable to the case. It might as well have been marked "refused." We think that was the proper disposition to be made of it. It was hardly a proposition of law, in the sense of the statute. In effect, it asserted that, upon the few admitted facts therein stated, the claimant here was entitled to take and have the amount claimed "out of the proceeds of any land that had belonged to Isaac Loucks in his lifetime, and which his administrator had sold under order of the County Court to pay debts of his estate." It entirely ignored the questions of *laches* and waiver and estoppel. If it ought not to have been held and the court had refused to notice it in any way, such refusal could have done the appellant no harm. The record shows the proposition and the court's disposition of it. We think that for all the purposes contemplated by the statute it was in effect marked refused; but if not, the error is not material.

It is claimed that the right of the widow's administrator to have her award estimated and set off to him as such, out of the estate of her deceased husband, is *res adjudicata* by the order of the County Court appointing the appraisers, affirmed by the Circuit Court and not further contested. But that order could not determine his right to the particular claim here contested. For how could that question arise until appraisers were appointed and executed their warrant?

Coming then to the merits, we are of opinion that appellant's claim was properly disallowed, for the reason that his decedent by her own act had barred her right, and therefor also his, to treat this land or the proceeds of its sale as of the

estate of her husband. She treated it as her own, and in a way absolutely incompatible with any just claim by her or her representative now to treat it otherwise. As her own she has received the full benefit of it. It legally was her own, except as to creditors of her husband. No such creditor has asserted or can now exercise his right as against her. She has in fact held and enjoyed, and by her own voluntary, deliberate, solemn and irrevocable act—legal and valid as against her—disposed of it as fully and completely as if there had been no such creditor. The law in his favor has not operated and can not now operate against her. Having once, as devisee, asked and received for it a full consideration which can not be restored or recovered, she ought not to be permitted again to dispose of it for her own benefit as creditor of her husband. If she still has a claim as such, it must be against something else of her husband's estate, and not against the property she has conveyed. She could dispose of it absolutely but once on co-existing grounds of right, however numerous, distinct or just they might be.

Again, if this property was ever subject to her claim she was not bound to assert it. She might waive it. The statute allowing it is for her benefit. Her creditor could not assert it, nor compel her to assert it for him. If she intended or desired to apply for this allowance, it was her duty to do so and have the proper steps taken within a reasonable time. *Furlong v. Riley*, 103 Ill. 632. Her death did not occur until nearly five years after she was appointed and might have acted as executrix. That time might not of itself bar her application, though the law fixes no particular period of neglect as constituting *laches*, but in connection with her positive acts in appropriating the entire estate as devisee, and removing to another jurisdiction, may well be held to be a waiver of her claim. Whether by reason of ignorance of the law or not, it is clear that she never in fact contemplated any such proceeding. It is instituted wholly by and in the interest of her creditor; and for the reasons indicated we think the claim, as against appellee and the fund in question, is without merit or legal right.

Judgment affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY
V.
BLANCHE LATIMER.

Railroads—Removal of Child from Train—Non-Payment of Fare—Personal Injury—Bond for Costs—"Station"—Damages—Evidence—Instructions—Declaration—Misjoinder.

1. In a suit brought by a minor, by her next friend, the bond for costs may be filed, by permission of the court, after the commencement of suit.

2. The word "station," in the statute, means the point or place where passengers usually board and leave trains.

3. In an action brought by a child, by her next friend, against a railroad company to recover damages resulting from her removal from the defendant's train at a place other than a station, it is *held*: That the declaration is sufficient, there being no misjoinder; that evidence to show that a "wild train" was following the train from which the plaintiff was removed, was properly admitted; that there is no substantial error in the instructions; and that the verdict for \$2,000 in favor of the plaintiff is not excessive.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of DeWitt County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. MOORE & WARNER, for appellant.

Messrs. R. A. LEMON and GRAHAM & MONSON, for appellee.

CONGER, P. J. The principal facts in this case are as follows:

Blanche Latimer, the appellee, aged six years, resided with her parents at Clinton, Illinois, but had been visiting for a few days her friends at Wapella, a village of some three hundred inhabitants, situated about four and a half miles north of Clinton, on appellant's railway.

On the 14th of June, 1887, she went to the depot at Wapella for the purpose of returning home on the four

o'clock train. She had with her a large paper hat box and its contents, making it quite heavy for so small a child to carry. At the depot she met her uncle, who resided in the village, who led her to the rear car and placed her in a seat.

After the train had gotten under way, the conductor, Finch, proceeded to take up the tickets and collect the fares. When he reached appellee he asked her for her ticket and she replied she had none. He then asked her to pay her fare in money, and she told him she had none. He then asked her where she was going, but he says he could not understand her answer. He then asked her whose child she was and she said she was going to Clinton. Finch told her, then, he would have to put her off, signaled the train to stop, walked back to the rear end of the car, motioned to the little girl to come to him, which she did. Finch says that he got down on the ground and lifted her, with her bundle, to the ground and led her around on to the track in the rear of the train, when the child immediately started to run up the track toward the station and he called to her not to run. She obeyed him and slackened her pace to a walk, while the conductor signaled the train to start and left her. The brakeman of the train, Keefer, says he thinks Finch stood on the step of the coach and lifted the child by her arm to the ground at the side of the car, and she went around on the track by herself.

The place where appellee was thus put off was about 1,700 feet from the platform at the depot, where passenger trains stopped to take on and put off passengers.

While within the corporate limits of Wapella, it was about 240 feet south of the last street of the village in that direction, and the track at that place was fenced.

In going north from the point where appellee was put off the train, she would have to go about 240 feet, where the fencing of the track ended, and where was a cattle guard between thirty and thirty-four inches deep, and immediately beyond it a culvert twelve feet long and six deep, with ties upon it eight inches wide and eighteen inches from center to center.

Appellee was met between the point where she was put off and the depot, by her uncle, and he testifies that she was crying and seemed frightened.

Evidence was given to the jury tending to show that she seemed to suffer for some time from fright and nervousness, and that she manifested a disinclination and fear of talking about going upon the cars, which had not been the case before. There was also medical testimony given to the jury, both to sustain and overthrow the theory that the child, at the time of the trial below, was suffering from some functional derangement of the heart, caused by the fright occasioned by her being expelled from the train. The jury returned a verdict for \$2,000, upon which judgment was rendered.

The suit was commenced by appellee, who sued by her mother, as her next friend, without previous authority of the court, and without in the first instance giving a bond for costs.

Appellant moved to dismiss the suit for this reason, and the court permitted appellee to file a cost bond, and thereupon refused to dismiss the suit, and this is urged as error, and the proviso of Sec. 18, of the act as amended and in force July 1, 1881, is relied upon to sustain this view. It is as follows:

“Provided, that any suit or proceeding may be commenced and prosecuted by any minor, by his next friend, without any previous authority or appointment by the court, on such next friend entering into bond for costs, and filing the same in the court in which, or with the justice of the peace before whom such suit or proceeding is instituted.”

We think the court rightly exercised its discretion in the matter, and that a fair and reasonable construction of this section does not make the filing of the bond prior to the bringing of this suit necessary for the jurisdiction of the court, but that if a bond is filed afterward by permission of the court, it is sufficient.

The object of the law, which is both to protect the minor's estate and the officers, and adverse parties, is fully satisfied, and it would be a harsh and unreasonable construction to say that when, perhaps by inadvertence or mistake, a bond is not filed, that it can not be remedied, but a minor's suit must be dismissed.

The objection to the declaration that there was a misjoinder, is not, as we think, well taken. The first count charges that the appellant, as a corporation, assaulted her; the second, that she was a passenger upon appellant's train, and that one Finch, the conductor of the train, in the employment of appellant, did with force, etc., remove appellee from said train, etc., at a place other than a regular station, etc. The second count is substantially a charge that the appellant, by its conductor and agent, did the wrong to appellee, and is sufficient.

Appellee was permitted to prove, over the objection of appellant, that Finch's train carried a flag which indicated that a wild train was following his, and that such wild train did pass Wapella about twenty or twenty-five minutes after the passenger train had left.

We see no objection to this evidence, for it was one of the circumstances which the jury had a right to know and take into consideration in determining the character of the expulsion.

The fact that the conductor knew that a wild train was following him, and might be expected in a few moments, might well be regarded as important when a little child but six years old was to be left upon the track, with a cattle guard and culvert, of the character already described, to be crossed.

Had appellee been a grown woman, the fact that a train might pass before she could get back to the depot would be of no consequence, as it would be presumed she would be able to avoid the danger.

Neither does the fact that the child had reached the depot and left the track before the wild train passed, make the evidence improper.

The jury had a right to know the condition of affairs, as it appeared to the conductor at the time of the expulsion, and from that characterize his action.

Instructions holding that the word "station," as used in the statute, included the limits or inhabited portions of cities and villages in which the depot building is situated, and that a passenger may be lawfully removed from trains for non-payment of fare anywhere within the inhabited portion of such

limits, were presented by appellant to the court, and refused. In thus holding the court committed no error.

A regular station, as used in the statute, means the point or place where passenger trains usually receive and discharge passengers—where persons would have a right to have trains stopped for entering upon or leaving them. *Chicago & Alton v. Flagg*, 43 Ill. 368.

Objection is made to some of the other instructions, but when they are all considered together, we can not say that appellant has not had a substantial presentation of the law applicable to the case. Some of them are not quite accurate, but, taken as a whole, fairly present the law of the case.

It is urged that the damages are excessive. Under ordinary circumstances this objection would be well taken. Had appellee been of sufficient age to justify the belief that she could have returned to the depot without harm or danger to herself, no one, we presume, would insist that she ought to recover any such sum as she did. But the circumstances of this case are so unusual that it is easy to believe that the conductor acted with a wanton disregard of the rights of appellee. When it is remembered that appellee was a delicate little girl, only six years old, taken off the train—no matter how gently—suddenly left alone upon the track, and the train speeding away, it is a wonder that, in her fright and agony, she had presence of mind enough to know the way back to the depot.

Just how much a railroad company ought to pay for such treatment is difficult to measure by any exact standard, and the jury having determined it without prejudice or passion, so far as we can discover from a careful inspection of the record, we do not feel justified in interfering with their conclusions. A majority of the court are of opinion that the judgment should be affirmed.

Judgment affirmed.

THE GERMAN INSURANCE AND SAVINGS INSTITUTION.
v.
FREDERICK G. VAHLE.

*Negotiable Instruments — Discharge — Note — Principal and Surety—
Collateral Security—Extension of Time—Evidence—Instructions.*

1. Where the payee of a personally secured note takes, as collateral security, a note secured by mortgage maturing at a later date this does not of itself, in the absence of an agreement to that effect, extend the time or discharge the surety.

2. In the case presented, an instruction to the effect that the mere taking of a note having a longer time to run would not be conclusive proof of an extension, was improperly refused, and evidence to show whether there was an agreement to extend the time of payment was improperly excluded.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Adams County; the
Hon. WILLIAM MARSH, Judge, presiding.

Mr. JOSEPH N. CARTER, for appellant.

A contract between the holder of a promissory note and the principal, to extend the time of payment in order to discharge the surety, must be a binding contract, and founded upon a good and sufficient consideration; and must be an agreement to extend the time of payment for a definite period. It must also have been entered into by the holder of the note and the principal debtor; and the debtor seeking to avail himself of the defense of such release must be simply surety, and known by such holder to be such at the time of such contract. *Gardner v. Watson*, 13 Ill. 347, 352 and cases there cited; *Flinn v. Mudd et al.*, 27 Ill. 323.

Mr. CHESTER A. BABCOCK, for appellee.

CONGER, P. J. This was a suit by appellant against appellee upon a promissory note. The principal facts are as follows:

On the 29th of August, 1883, Conrad Schroder and John B. Tolle, together with appellee, executed to the appellant their promissory note for \$800, due in one year from date. The money was paid to Tolle. Schroder and Tolle seem to have been the principals in the note, while appellee was a surety only. The note was not paid at maturity, and on the 3d of September, 1884, the appellant being desirous of further security, Schroder made an arrangement with the officers of the appellant by which he executed to appellant a note for \$3,200, dated upon that day and due one year thereafter. This note for \$3,200 included the sum of \$2,400, which appellant furnished to pay off an existing incumbrance on Schroder's farm to one Baker, and the \$800 note previously described and involved in this suit. Schroder, at the same time, executed a mortgage on his farm to secure this \$3,200 note.

It is insisted by the officers of appellant that the arrangement was, that if Schroder would procure the signature of Tolle and appellee to the new note for \$3,200, then the \$800 note should be considered paid and surrendered up to Schroder; but if they did not, appellant would continue to hold the \$800 note, and hold the excess of the new note above the amount paid to Baker as collateral thereto, and apply any excess that might arise by sale of the property mortgaged, upon the \$800 note.

Schroder does not seem to be entirely clear in his recollection upon this point. He is asked upon cross-examination the following question: "And the balance of that \$3,200 was to be as security for the \$800 note, wasn't it?" To which he replied: "I don't think there was anything said about that. I did not take up the \$800 note. I thought the others would sign the \$3,200 note. I didn't know surely that they would."

Appellee never signed the \$3,200 note. Appellant afterward foreclosed and sold under their mortgage, and, it appears, bought in the property at the sum of \$2,800; but whether there was anything left to apply on the \$800 note in suit after paying the expenses and the \$2,400 loaned to pay off the Baker mortgage, does not appear, the court refusing to let appellant make the proof upon that point.

The theory of counsel for appellee seems to be that the mere fact that appellant took from Schroder the note for \$3,200, secured by mortgage, which included the original note of \$800, made a valid extension of time on the latter note until the former matured, and thereby worked the release of the appellee as surety upon the \$800 note. The following extract from his brief seems to sustain this view.

“Was the extension for a definite time? Appellant’s third point, the testimony of the president, secretary and attorney of appellant, just above cited, answers this query. If the \$3,200 note was paid, the \$800 note would be paid. This necessarily contemplates awaiting the maturity of the \$3,200 note. If the mortgage was foreclosed for non-payment then the proceeds of the foreclosure sale were to be applied, first to costs and expenses of foreclosure and sale, then to the Baker loan, included in the \$3,200 note, then the remainder, if any, to the \$800 note. Necessarily this implies that the time upon the \$800 note was extended until the closing out by payment or foreclosure of the \$3,200 note. The extension was for one year from September 3, 1884, or the maturity of the \$3,200 note, and as much longer, if default in payment were made, as it might require for foreclosure, or the company might choose to take about such foreclosure. But until the proceeds of that \$3,200 note had been applied, as agreed upon, no suit could be brought upon the \$800 note.”

The same view of the law seems to have been entertained by the court, as the following instruction was refused.

“No. 12. The court instructs the jury that a mere failure of plaintiff to sue on said eight hundred dollar note, or to collect the same, or the taking of collateral security for payment of the same, whether or not such collateral security was in the shape of another note having a longer time to run and bearing interest, would not be conclusive proof of an agreement to extend, or an extension of the time of payment of said eight hundred dollar note.”

This instruction should have been given. In Brandt on Suretyship and Guaranty, Sec. 320, it is said: “It has been repeatedly held that the mere fact that the creditor takes from

the principal a mortgage or trust deed of property as collateral security for the debt for which the surety is liable, which matures after the maturity of such debt, does not of itself, in the absence of an agreement to that effect, extend the time or discharge the surety." *Burke v. Cruger*, 8 Texas, 66; *Williams v. Townshend*, 1 Bosworth (N. Y.), 411.

In *Brengl v. Busby*, 40 Mo. 141, a case similar in principle to the one at bar, it is said: "After the maturity of a note upon which principal and surety were liable, the principal executed and delivered to the creditor as collateral security a mortgage of real estate, to secure a larger sum than the note, in which the amount of the note was included. The mortgage contained a covenant on the part of the mortgagor to pay the money on a day therein named, but no provision that the right of action on the note should be suspended. Held, the remedy on the note was not suspended, and the surety was not discharged." *Baylies on Sureties and Guarantors*, Sec. 9.

"Whether there was or not an agreement to extend the time, may be shown by parol." *Morse v. Huntington*, 40 Vt. 488.

As the mere taking of the \$3,200 note and mortgage did not of itself release appellee from the note in suit, it remains to determine whether there was any such contract entered into between appellant and Schroder as would produce that effect. Upon this point we shall express no opinion, as the case will have to be submitted to another jury. But we think the court erred in refusing to permit Govert to answer the following question: "Was there anything in any of the conversations said about extending the time of the \$800 note?" The witness was attempting to give to the jury a statement of the various conversations between the officers of appellant and Schroder, in reference to the purpose of executing the new note and mortgage, and it would be quite important to show whether there had been any agreement to extend the time of payment of the \$800 note, as we have seen the mere taking of the new note and mortgage would not of itself work such an extension.

Appellant should have been permitted to show the disposition of the proceeds of the sale of the mortgaged property,

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because, if the jury should reach the conclusion that there had been no valid extension of time by which appellee would be released, then it would be important to know whether any of the proceeds arising from the sale of the mortgaged property either were, or should have been applied, as a payment upon the note in suit.

For the errors indicated the judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

THE COMMISSIONERS OF THE MASON AND TAZEWELL
SPECIAL DRAINAGE DISTRICT

V.

WILLIAM L. GIFFIN ET AL.

Drainage—Enlargement of District—Notice—Certiorari—Act of 1885.

1. When a drainage district embraces land in two counties, a proceeding by *certiorari* to review the proceedings of the commissioners is within the jurisdiction of the Circuit Court of either county.

2. Upon the proposed enlargement of a drainage district, it is necessary to give the same notice as is required when such district is originally formed.

3. In the case presented, the notice of the proposed enlargement was insufficient, the first publication thereof having been eighteen days before the term of the court at which the parties interested were to be heard, instead of twenty days, as required by the act of 1885.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Tazewell County; the Hon. N. W. GREEN, Judge, presiding.

Messrs. WALLACE & PRETTYMAN, for appellant.

Messrs. JAMES H. SEDGWICK and GEORGE RIDER, for appellees.

CONGER, P. J. This was a proceeding by *certiorari* to review the proceedings of the commissioners of the Mason and Tazewell Special Drainage District, whereby it was attempted to enlarge the original boundaries of the district, by attaching thereto the lands and highways within certain prescribed limits, under and by virtue of the provisions of Sec. 42 of the drainage act of 1885, Sess. Laws 1885, page 91.

In the Circuit Court these proceedings of the commissioners were quashed and they bring the case here for review.

It is insisted that the Circuit Court of Tazewell county had no jurisdiction of the subject matter, for the reasons that the district was organized in the County Court of Mason county, and their office was in Mason county. The original district comprised territory in both Mason and Tazewell counties, and the lands sought to be annexed are principally in Tazewell county.

We do not think this objection well taken. Appellant is a corporation originally created in both counties, and, by the proceedings which are in this record questioned, operating upon the lands in both counties, and we are therefore of opinion the Circuit Court of either Tazewell or Mason had jurisdiction of the subject-matter.

A number of questions are discussed with great ability, but we deem it necessary to notice but one, and that is whether the proper notice as required by law, was given.

Section 42 of the act of 1885 does not in terms require notice to be given of the proposed action of the commissioners, but provides: "Drainage commissioners may at any time enlarge the boundaries of their district by attaching new areas of land, which are involved in the same system of drainage, and require for outlets the drains of the district made or proposed to be made, as the case may be, on the petition of as great a proportion of the land owners of the district so enlarged as is required for an original district."

In determining the question of enlargement, the commissioners must determine whether the new area which is proposed to be included in the district, "is involved in the same system of drainage, and requires for outlets the drains of the

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district," and in determining this question they must investigate, deliberate and decide, in doing which they act in a *quasi* judicial capacity. Wright v. City of Chicago, 48 Ill. 285.

We are inclined to think that a fair construction of the law of 1885 contemplates the same notice when a district is enlarged, as is required when it is originally formed, and this seems to have been the theory upon which appellant proceeded, as there appears from the record an effort to give the notice as required by Sec. 50 of said act.

That section requires notice by posting notices in at least five public places in each township in which said proposed district, or any part thereof shall lie, also by publishing for three successive weeks a like notice in some weekly newspaper in said county or counties, which said notice shall contain a copy of the petition, and state the day of the term of court when such petition and all parties interested will be heard. The posting and first publication of said notices shall be at least twenty days before the hearing of said petition.

The first publication in Tazewell County was upon the 23d of December, and the hearing before the commissioners was upon the 10th day of January thereafter, making but eighteen days, instead of twenty, as required.

If notice was required at all, a failure to give it would be fatal to the jurisdiction of the commissioners to act.

We are inclined to think, therefore, that the proceedings of the commissioners in attempting to enlarge the district were fatally defective for want of the requisite notice, and that the judgment of the Circuit Court, in quashing such proceedings, should be affirmed.

Judgment affirmed.

BESSIE W. IVES

V.

THE JACKSONVILLE NATIONAL BANK ET AL.

Partnership—Death of Member of Firm—Bill for Accounting—Administration—Failure of Executrix to Qualify in This State—Petition of Creditors for Appointment of Administrator—Lapse of Time.

Upon petition of creditors praying the appointment of an administrator of the estate of a deceased debtor leaving property in this State, his executrix having failed to qualify here, this court declines to interfere with an order for such appointment, although a year elapsed between the closing of the litigation fixing the liability and the filing of the petition.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding.

Charles L. Ives and Matthew Ashelby formed a partnership for the purpose of carrying on the business of storing, buying and selling ice in the city of Jacksonville, on or about the 15th day of November, A. D. 1875.

Charles L. Ives died March 15, 1879, having first made and published his last will and testament, which was duly probated in the Probate Court of New Haven county, Connecticut.

The appellant, Bessie W. Ives, was by said will constituted the sole executrix thereof. She duly qualified as such executrix and took upon herself the execution of said will.

At the November term, 1882, of the Circuit Court of Morgan county, Illinois, the said executrix, Bessie W. Ives, exhibited her bill of complaint against Matthew Ashelby, alleging the partnership formed between decedent and the said Matthew Ashelby; that, during the continuance thereof, the said Ives was a non-resident of the city; that the said Ashelby had had the entire control and management of the business; that no settlement of the partnership transactions between the said Ashelby and the said Ives had ever been made in the lifetime of the latter, nor had the said Ashelby ever made settlement of said partnership affairs with her as such executrix, since the death of his partner; that since the death of the said Ives, the said Ashelby had continued in the possession and enjoyment of all the partnership assets; and praying for an accounting and settlement of the partnership accounts.

Such proceedings were had in said cause, that at the November term, 1885, a decree was rendered finding the said firm of

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Ashelby & Co. indebted to the Jacksonville National Bank in the sum of \$6,058.20, and to M. Ashelby in the sum of \$5,243.80, and ordering and directing the sale of certain partnership real estate, and ordering and directing the said Bessie W. Ives, as executrix, to pay to Ashelby and the Jacksonville National Bank the aforesaid sums found due them, less the net proceeds of sale of said real estate, after paying costs and certain preferred claims.

On the 26th of December, 1886, the Jacksonville National Bank and Matthew Ashelby filed their petition in the County Court of Morgan county, Illinois, setting forth that the said Charles L. Ives had died testate, as above stated; that, under and by virtue of the aforesaid decree, they were creditors of the estate of said Ives in the aforesaid sums of \$6,058.20 and \$5,243.80, respectively, and that the testator died seized of real estate situated in the county of Morgan and State of Illinois, and that the same is still unsold; that the said Bessie W. Ives has duly qualified as executrix of said will, in the county of New Haven and State of Connecticut, but has never taken out letters of administration in the State of Illinois; that they are informed and believe that the said Bessie W. Ives is about to sell the real estate of said decedent, in said Morgan county, and that there is danger of its being sold to the purchaser without notice; praying that letters of administration be granted to some discreet and proper person.

The County Court, upon the hearing of said petition, granted the same and ordered that letters of administration with the will annexed be issued to Bazzil Davenport, public administrator, from which decision Bessie W. Ives prayed an appeal to the Circuit Court.

Upon the hearing of said appeal, the Circuit Court made an order affirming the order of the County Court granting such letters of administration, from which order appeal is brought to this court.

Messrs. BROWN & KIRBY, for appellant.

Messrs. MORRISON & WHITLOCK, for appellee.

CONGER, P. J. The question to be determined is, has the lapse of time between the death of Charles L. Ives and the date of the application for letters of administration been sufficiently explained to authorize the County Court to issue letters upon the petition filed. We think it has.

The litigation which fixed the liability of Ashelby & Co., was closed in November, 1885, and the petition for letters was filed in the County Court on the 26th of November, 1886.

Each case must be governed by its own peculiar facts and circumstances, and we think in this case the delay has been sufficiently explained.

The order of the Circuit Court will be affirmed.

Order affirmed.

ROSALIA E. KREITZ

V.

ELISA B. HAMILTON, ASSIGNEE, ET AL.

Mortgages—Trust Deed—Foreclosure—Limitations—Sections 11 and 16, Act of 1872.

The statute prohibiting the foreclosure of mortgages, unless within ten years after the right of action accrues, does not prevent foreclosure after the expiration of ten years, where the note or other evidence of indebtedness secured has been extended by payment or new promise. The right of foreclosure extends until such indebtedness is barred.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

MESSRS. H. S. DAVIS and CARTER & GOVERT, for appellant.

Where the statute of limitations barred all right of action on a promissory note if such action was not brought within sixteen years after it accrued, it was held that the right to foreclose a mortgage given to secure such note was also barred;

that as a general rule, courts of equity will follow the law in applying the statute of limitations; and so long as the remedy at law exists on the note, the remedy by foreclosure of the mortgage in equity also will exist. *Harrison v. Mills*, 28 Ill. 44; *Pollock v. Mason*, 41 Ill. 516; *Emery v. Keighan*, 88 Ill. 482; *Emery v. Keighan*, 94 Ill. 543; *Greenman v. Greenman*, 107 Ill. 404; *McMillan v. McCormick*, 117 Ill. 79; *Wood on Limitation of Actions*, p. 117.

From the cases cited it appears that long before the passage of the statute of 1872 there has been a statute of limitations in force in this State applicable to mortgages, as effectual to bar a remedy by foreclosure as, by suit at law, to recover the debt; the only difference being that the time prescribed was sixteen years instead of ten years, as now provided. These cases hold that the mortgage is a mere incident of, and must follow, the debt. And in *Delano v. Bennett*, 90 Ill. 536, it was held that a conveyance by the mortgagee, without assignment of the debt, is a nullity.

Messrs. BERRY & EPLER, for appellees.

The bearing of Sec. 11 on mortgages executed after its taking effect is yet undecided in this State. It furnishes an express limitation to the action of foreclosure. The main question at issue here is not so much what effect this section has, but rather whether it shall be given any effect. In considering this, regard should be had to the legislation, judicial decisions and policy of this State.

We contend that the object of this statute was to make the liens of mortgages and trust deeds of definite duration, and that such liens and their duration should be a matter of public record. The act is remedial and should be liberally construed.

Statutes of limitation should be construed favorably. *Wood on Limitations*, Sec. 4.

The law works no hardship or injustice in this case. It was appellant's own folly not to have foreclosed her lien before the ten years were up. The court in this case are not dealing with a presumption but an express limitation, and they

should give it effect as a statute of repose and for the security of title. *Hubbard v. Stearns*, 86 Ill. 35.

If the lien is not barred until the debt is barred, as appellant contends, it was not necessary to pass Sec. 11 merely to apply the ten years limitations to mortgages and deeds of trust, for that is accomplished by Sec. 16. To so hold would leave the mischief of the old law unremedied, and the life of the lien uncertain and unascertainable of record, and would render Sec. 11 nugatory and of no effect whatever; passing it, then, was a vain and useless thing.

The intent and purpose of the Legislature should be enforced. Their object was to effect a change in the law, and to bar foreclosure ten years after the cause of action accrued, and this was done by section eleven in words as plain as the English language can make it. It means what it says or it means nothing. There is no room for construction. The court should enforce it and not render it nugatory.

"Where a statute is expressed in clear and precise terms, where the sense is manifest, and leads to nothing absurd, or where its provisions, if literally applied, would work no palpable injustice, nor contravene any imperative public exigency, there can be no reason not to adopt the sense it naturally presents. In such cases there can be no necessity for restricting its operation, and the statute should be enforced as it is plainly written. *Newell v. People*, 7 N. Y. 9; *Potter's Dwarris*, 145; *Chicago, M. & St. P. R. R. Co. v. Dumser*, 109 Ill. 402; *Law v. People*, 84 Ill. 392.

Because the law is that when the debt is barred the mortgage is also barred, it by no means follows that the mortgage lien may not be barred before the debt is barred. Clearly it was competent for the Legislature to separate the two, and bar the lien first, and there is nothing in reason or public policy why it should not do so.

Action on the mortgage may be barred though debt is not barred. *Eubanks v. Leveridge*, 4 Sawyer, 274.

Per Curiam. The questions presented by the record on this appeal arise upon the demurrer of Elisha B. Hamilton,

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assignee of the Union Bank of Quincy, Maurice Kelly and Catharine Eisenstein, guardian, to the amended cross-bill of Rosalia E. Kreitz, and the decree sustaining said demurrer and dismissing said cross-bill.

The amended bill, filed February 28, 1887, by said Elisha B. Hamilton, assignee of the said Union Bank of Quincy, was to foreclose a mortgage known as the Union Bank mortgage, dated May 1, 1884, made by John M. and Mary P. Kreitz to the Union Bank of Quincy, upon the west one hundred (100) feet of lot (6), and the north seventeen (17) feet of the east sixty-eight (68) feet of said lot six (6), in block five (5), in the original town, now city, of Quincy, Adams county, Illinois, to secure the payment of three notes of even date, made by said John M. and Mary P. Kreitz to said Union Bank of Quincy or order, for the sum of \$1,000 each, due respectively one, two and three years after date, bearing six per cent. interest from date. It was therein further alleged, among other things, in substance, that Maurice Kelly and Catharine Eisenstein, guardian, defendants to said bill, were the legal holders and owners respectively of said first and third notes, in the order of maturity, for \$1,000 each, and that said Hamilton, as such assignee, was the legal holder of said second note for \$1,000. The amended bill also charged that the debt secured by the trust deed of November 23, 1872, on the west one hundred (100) feet of said lot six (6), claimed by said Rosalia E. Kreitz, had been fully paid; that said trust deed was fraudulent and void, and should be canceled of record, and that it was barred by the statute of limitations, and asked for relief by foreclosure and sale under said Union Bank mortgage. The amended cross-bill of Rosalia E. Kreitz, filed April 12, 1887, seeks to foreclose a trust deed dated November 23, 1872, on the west one hundred (100) feet of said lot six (6), block five (5), in the original town, now city, of Quincy, Adams county, Illinois, made by said John M. and Mary P. Kreitz and Herman and Elizabeth Moecker to Edward H. Buckley, as trustee, to secure the payment of a note dated November 23, 1872, made by said Herman Moecker and John M. Kreitz, payable to the order of James M. Rice, for the sum of \$3,000,

due two years after date, bearing ten per cent. interest, payable semi-annually. She therein further alleges, in substance, that said note came to her hands by assignment; that its principal is wholly unpaid, but that its makers paid the interest thereon up to November 23, 1883, and had the same indorsed on the note; and that they repeatedly, within the past ten years, acknowledged said indebtedness, and promised to pay the same; and that the premises covered by said trust deed have at no time, since November 23, 1872, been held or occupied adversely to said trust deed, but always in full recognition of the same. She makes Elisha B. Hamilton, assignee as aforesaid, Maurice Kelly and Catharine Eisenstein, guardian, among others, defendants to said amended cross-bill, and charges that said defendants "have, or claim to have, some right or interest in said real estate described in said trust deed, or some part thereof, as purchaser, mortgagee, judgment creditor, lessee or otherwise." She further therein claims priority over the Union Bank mortgage and all other liens, and asks for foreclosure and sale of said premises under said trust deed.

To said amended cross-bill the holders of the notes secured by the Union Bank mortgage, appellees here, demurred generally, also assigning as special causes of demurrer that the cause of action relied upon in said cross-bill, and arising upon said trust deed, did not accrue within ten years before the beginning of said original or cross-litigation, and that the claim of said amended cross-bill was stale and barred by *laches* and lapse of time.

The court sustained the demurrer and dismissed said amended cross-bill, from which order said Rosalia E. Kreitz appeals.

For the purpose of this appeal, all facts well pleaded in said amended cross-bill on demurrer thereto are to be taken as true.

The bar of the statute relied upon is Sec. 11 of the statute of limitations, approved April 4, 1872, in force July 1, 1872, which section is as follows:

"No person shall commence an action or make a sale to foreclose any mortgage or deed of trust in the nature of a mortgage, unless within ten years after the right of action or right to make such sale, accrues."

Pearson v. Sanderson.

The trust deed and note was executed November 23, 1872, and the note matured, allowing for days of grace, November 26, 1874. Appellant's position is that, notwithstanding said section, her trust deed is not barred until the debt it secures is barred, and that payments of interest on the debt extend the lien of the trust deed as well as the running of the statute on the note.

Appellees insist that the action to foreclose the trust deed was barred ten years after that right of action accrued, *i. e.*, the maturity of the note, and that it was not continued or affected by interest payments on the debt, and that therefore the appeal should be dismissed and the decree of the Circuit Court affirmed.

The record squarely presents this question: What effect has Sec. 11 of the limitation act upon a mortgage or deed of trust executed after that act went into force and operation? The propriety of the decision of the court below, in sustaining the demurrer to appellant's cross-bill, is to be determined by the true construction of Sec. 11 of the limitation act of 1872.

In the recent case of *Schefferstein v. Allison*, 123 Ill. 662, this question is decided, and according to the doctrine there announced, it was error to sustain the demurrer.

The decree of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

GUSTAVUS C. PEARSON

V.

JAMES SANDERSON.

Landlord and Tenant—Improvements by Lessee—Value of—Appraisal at Termination of Lease—Notice—Arbitration—Instructions—Interest.

1. An agreement between landlord and tenant whereby the former is to take, at the termination of the lease, improvements erected thereon by the

latter and pay therefor the sum named by appraisers to be mutually agreed upon, is not a submission to arbitration, and no notice to the parties is necessary before making the appraisement, unless the lease so provides.

2. In the case presented, interest was properly allowed on the amount of the appraisal after notice to the defendant and request to pay such amount.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Vermilion County; the Hon. C. B. SMITH, Judge, presiding.

Mr. J. B. MANN, for appellant.

The view taken by appellant, of this case, is that the so-called appraisers were in fact, arbitrators, and that their actions should have been in all respects governed by the rules affecting arbitrations. It was upon this theory that the special pleas were interposed, and the action of the court in sustaining the demurrer to such pleas is the principal error relied upon by the appellant for a reversal of the judgment below.

The law has no regard for the particular nomenclature adopted by parties in entering into contracts, but will give to the language employed its proper legal signification. If, therefore, the so-called appraisers are in fact arbitrators, the courts will so treat them and define their duties accordingly. *Van Cortland v. Underhill*, 17 Johns. 405; *Lanman v. Young*, 31 Pa. St. 306.

The rule requiring notice of the hearing is without exception, and if there has been no such notice there can not be a legal hearing or a valid award. *Morse on Arbitration and Award*, 118.

The appraisers in the case at bar had necessarily to decide many more questions than the mere value of property. Before any award could possibly be made by them, it was imperatively necessary that they should agree upon the following matters. (1.) What improvements were made on the leased premises by appellee? (2.) Were such improvements permanent? (3.) Were such improvements authorized by the terms of the lease? (4.) What was the fair cash value of such

improvements, and as an incident thereto what value did they add to the premises?

I think it is giving to their duties no undue or strained construction, to say that they were charged with the determination of each of said questions. The lease provides that the persons to be chosen shall determine the then cash value of the permanent improvements made by the lessee, etc. It therefore was very material that they should determine and decide who made the improvements.

Mr. F. BOOKWALTER, for appellee.

An arbitration is defined to be the investigation and determination of matter or matters of difference between contending parties, by one or more unofficial persons chosen by the parties, and called arbitrators. 3 Sharswood's Bl. Com. 16; Norton v. Gale, 95 Ill. 533.

It will be seen that arbitrations refer to matter in dispute between contending parties, at the time the contract is made, in regard to the selecting of arbitrators. The appointment of appraisers is for the purpose of avoiding any difference between the parties. In the case at bar the parties contemplated by their contract that appellee should go upon appellant's premises and occupy them for five years; in the meantime that he should make permanent improvements thereon, and that all of said improvements that he left on said premises at the end of the five years should be paid for by appellant, at a price fixed by appraisers. Now, it will be seen that the element of matters in dispute is absent, and also contending parties, as contemplated in cases of arbitration. There was no necessity for it, nor was it intended by the parties to the contract, nor would it have been proper for the appraisers to have been sworn like arbitrators are usually sworn, nor would it have been the proper thing for the appraisers to do to have had witnesses sworn and proceeded as arbitrators. If they had done so then the appellant would have objected more strenuously than he now does. He then, no doubt, would have contended that they were acting only as appraisers. Appellant at no time asked the appraisers to proceed as arbitrators. Calling this matter an arbitration and the appraisers

arbitrators is purely an afterthought on the part of the appellant.

That the matter in question was not an arbitration and not to be governed by the rules regulating arbitrators, has been conclusively settled in this State by a long line of decisions. *The Board of Trustees of the Illinois and Michigan Canal v. Lynch*, 5 Gilm. 521; *McAvoy v. Long*, 13 Ill. 147; *Snell et al. v. Brown*, 71 Ill. 133; *Korf v. Lull*, 70 Ill. 420; *Norton v. Gale*, 95 Ill. 533.

No notice is necessary to the parties, because they are bound to take notice of the acts of the appraisers. *McAuley v. Carter*, 22 Ill. 53; *Norton v. Gale*, 95 Ill. 533.

The finding of the appraisers draws interest at the rate of six per cent. per annum from the time it was made. *Downey v. O'Donnell*, 92 Ill. 559.

WALL, J. This was an action of assumpsit, by appellee against appellant. Appellee recovered a judgment for \$1,724.71 and costs. The main question in the case arises upon the construction of the contract set out in the declaration.

That contract was executed by the parties to the suit on the 28th of April, 1881, and provided that in consideration, etc., the appellant leased to appellee for the term of five years certain lots in Danville, upon which to erect a mill and dwelling house. It also provided, among other things, that at the end of the term the value of the improvements should be fixed by appraisers (each party to select one, and the two, if not able to agree, to select a third), and the valuation decided upon by two of the three appraisers should determine the amount to be paid by appellant to appellee for said improvements. It is clear from the language of the contract, which is thus summarized, that the lessor was bound to pay for the improvements the sum ascertained by such appraisal. It is insisted by appellant that the proceeding thus provided for was an arbitration in legal effect, and that it was necessary to the validity of the appraisal that notice should be given of the investigation, and that, in all respects, the actions of

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the appraisers should be governed by the rules affecting arbitrations. The Circuit Court held otherwise, and we concur in the ruling. The subject involved was very fully discussed in *Norton v. Gale*, 95 Ill. 533, and we deem it unnecessary to say more than that in our judgment the principles there announced are decisive of this case. *Stose v. Hussler*, 120 Ill. 433, and cases there cited. This disposes of the controversy in chief. There were some questions of fact, which were solved by the jury against appellant, but they call for no special notice here.

It is argued the court erred in advising the jury by instruction that the plaintiff might recover the appraised value of all permanent improvements, and that in this respect the inquiry should have been limited to the value of the mill and dwelling house. We think the court properly construed the contract in this respect, and that, as applied to the facts in proof, the instruction was right. It is also insisted there was error in allowing interest on the amount of the appraisement, after notice to the defendant and request to pay. In this we are disposed to agree with the Circuit Court. *Downey v. O'Donnell*, 92 Ill. 559; Sec. 2, Ch. 74, R. S. The judgment will be affirmed.

Judgment affirmed.

D. R. KLINGER, IMPEADED, ETC.,
V.
THE PEOPLE.

Drainage—Formation of Districts—Highway Commissioners—"System of Drainage"—Quo Warranto—Acts of 1879 and 1885—Judgment of Ouster—Costs.

1. The drainage acts of 1879 and 1885 do not contemplate the formation of districts so large as to require different systems of ditches in order to drain the lands therein embraced.

2. Upon an information in the nature of a *quo warranto* charging that the respondents usurped the office of drainage commissioners, it is *held*: That

no sufficient petition was presented for a district comprising four systems of drainage; that the court below properly entered judgment of ouster and for costs; that all the land in the town was improperly included, as but a small portion thereof would be benefited by the same system of drainage; and that such a district could not be administered under the acts of 1879 and 1885.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Piatt County; the Hon. J. F. HUGHES, Judge, presiding.

MESSRS. A. T. PIPHER and S. R. REED, for appellants.

MESSRS. CHARLES HUGHES and J. L. RAY, for appellee.

PLEASANTS, J. This was an information in the nature of a *quo warranto* filed by the State's attorney of Piatt county against Klinger, Vandervort and Wooding, charging, in separate counts, that respondents usurped the office of drainage commissioners of the town of Blue Ridge, of drainage commissioners of drainage district number one, of said town, and of drainage commissioners of, in and for certain pretended drainage districts or systems of drainage which they have designated as drainage systems number one, number two, number three and number four, respectively, and without right or authority have proceeded to lay out, survey, plat and construct ditches therein, and to levy taxes, assessments, etc., therefor.

Respondents filed a plea averring that Blue Ridge was a town in Piatt county; that said county has for years been under township organization; that in 1883 there was presented to the town clerk of said town, with the requisite bond, a petition signed by a majority of adult owners of all the lands in said town, being also owners in the aggregate of more than one-third of all said lands, praying that a drainage district be organized, embracing all the lands in said town, for the purpose in that behalf in the statute mentioned; that due notice thereof was given to the then commissioners of highways of

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said town; that they proceeded regularly under the provisions of the Drainage Act, approved May 29, 1879, to organize, and did so organize the district prayed for, as Drainage District Number One, in said town; that no other drainage district has been organized in said town, and that respondents are now the commissioners of highways of said town. The plea set out at great length the several steps and proceedings taken by all concerned in the alleged organization, and the several provisions of the act above referred to; and of that approved June 27, 1885, by which, as they claim, the same were respectively directed or authorized.

A demurrer to the plea, assigning divers causes therefor, was sustained. Respondents Vandervort and Wooding then filed a disclaimer, and declined to defend further, and Klinger abiding by the plea, a judgment was entered of ouster and for costs against Klinger and Vandervort, Wooding having only just succeeded Wheeler (a former co-respondent) as commissioner of highways, and been substituted for him as respondent herein. From that judgment Klinger appealed and brings the record here for review.

On the part of the people it is contended that the plea shows the district therein referred to never had a legal organization, and further, that if it had, the respondents abandoned it, and have undertaken, of their own motion, without any petition, to create four distinct districts, under the name of "systems of drainage."

The plea states that upon the organization of said district the commissioners, in the discharge of their duties, went upon and examined all the lands within it to determine upon a plan of drainage therein, and upon such examination, being aided therein by a competent engineer, found the surface of the land in said district, embracing the whole town, was such as to constitute four distinct water sheds, having different directions for the natural flow of the surface waters thereof respectively; that the highest land was near the center of said district, east and west, but considerably south of the center, north and south, and extended thence northward, from which divide the natural flow of such water was about as follows: from

the east and southeast parts of said district to the south, or east of south into Madden run, from the northeast part to the northeast through a natural depression leading into the Sangamon river, and on the west side of the divide from the northern part to the southwest by way of Trinkle slough into Salt creek, and from the central and southern parts, also to the southwest, into Goose creek; that to provide a complete system of drainage for the district it would be necessary to construct main ditches for outlets, commencing at the divide near the center of the township and leading respectively into Madden run, Sangamon river, Goose creek and Salt creek; that no one continuous line of ditch could be constructed so as to provide efficient means of drainage for the lands embraced in the district as organized; that the commissioners determined upon a plan of work for chief or main outlets for the water of the district which flowed by way of Goose creek and Trinkle slough, and found it would require four main ditches as outlets to four separate areas of low and wet land having divides or swells of higher land between them—two of said areas flowing their water into Goose creek but discharging at different points, and the other two into Trinkle slough—but also at different points.

From these statements in the plea we understand it to be conceded, as it clearly is in the argument, that it is not practicable to connect or combine a system of ditches that would drain the land of the district as organized, or any two of the four water sheds first above mentioned. Each of these will require a system of drainage entirely separate from, and independent of, those of all the others.

The question, then, is whether the statute authorized the organization into one drainage district of lands so related, or rather, so unrelated with respect to drainage. We are of opinion it did not. We understand that the "system of combined drainage" is distinguished by the statute from the system of "individual drainage" which is therein recognized though not specifically so named. An individual proposing to drain his own lands at his own expense may do so, if necessary, through the lands of others, whether the latter are thereby

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benefited or not, making just compensation therefor as the law provides. The drain or drains constructed for that purpose will constitute a system no less than in the case of combined drainage, but it will require no district organization. But where there are lands so related that the same system will benefit all of them more or less, and it is proposed to construct it at the expense of all the owners in proportion to the benefits to their respective lands received, they may proceed to accomplish it without resort to condemnation in the mode prescribed. That is the system of combined drainage. The combination referred to is not of ditches, though that will generally be required, but of contribution to the expense of constructing, extending, improving and maintaining them. Here organization is necessary, since numbers of persons have a common, though not necessarily an equal interest. All who are so concerned have a right to be heard, and may favor or oppose the proposition, as each sees fit. If the requisite proportion in number and interest of the owners of such land petition for it, a district is formed which is by the law intended to embrace the lands to be benefited, and no other. Commissioners are provided to plan and execute, the lands are classified according to the relative benefit they receive, and assessments are made upon them in that proportion for the necessary means; and so the work is done and maintained.

Without referring specifically to the provisions of the statute or stating more minutely its practical operation, it must be obvious from this general view of the scheme, that for a good many reasons the district number one, in this case so-called, can not be such as is authorized or contemplated by it. As attempted to be organized it is uncommonly large of its class, embracing about sixty-four sections of land and including an incorporated village which has by law independent powers of its own in respect to drainage, besides much that needs no drainage and will not be drained. The ditch proposed for the northeastern watershed will be about five miles in length. It will not of itself, nor can it by any connection or combination be made to aid in draining an acre of either of the others. On principle, the owners of lands in the southwestern water

shed should have nothing to say about, nor should their lands be taxed for it. So of those owning lands in each of those four water sheds as to all the others. We think the statute conforms to this principle, and therefore that the plea shows no proper or sufficient petition for a district comprising the whole four, or either of the areas affected by the separate systems respectively; that all the lands in the town can not be embraced in one district, because so small a portion of them would be benefited by the same work or system of works that the affairs of such a district could not be administered according to the provisions of the act of 1879, or of that of 1885. And hence the proceedings taken for its organization can not have been validated by the later act.

Judgment affirmed.

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PLEASANTS, J. This is a companion of case No. 76, on the docket of this term. The information here challenges the authority of appellant and his co-respondents in respect to their proposed work in the "drainage system number four," of district number one, therein mentioned. For reasons given in the opinion filed in that case, we hold that the plea shows none whatever in respondents as drainage commissioners of any district, or as commissioners of highways or otherwise, for the work in question.

Judgment affirmed.

SAMUEL R. TILTON, ADMINISTRATOR,

v.

JOSEPHUS YOUNT, EXECUTOR.

Administration—Negotiable Instruments—Note—Statute of Limitations—Acts of 1849 and 1872—Sec. 101, Statute of Wills of 1845.

1. The statute of limitations of 1872 is not applicable to contracts of prior date.

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2. As a general rule, where a temporary incapacity to sue grows out of a particular provision of a statute, such disability interrupts the running of the statute of limitations.

3. In a proceeding to probate a note dated May 9, 1870, as a claim against the estate of the maker, the inability of the holder to maintain suit thereon against the administrator, for a period of one year, under Sec. 101, statute of wills of 1845, interrupted the running of the statute of limitations during the period of such inability.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Vermilion County; the Hon. C. B. SMITH, Judge, presiding.

Mr. GEORGE R. TILTON, for appellant.

Messrs. F. BOOKWALTER and ED. WINTER, for appellee.

WALL, J. This was a claim filed for probate in the County Court upon a promissory note signed by Milton Davis, bearing date May 9, 1870, payable six months thereafter to J. T. Yount. Davis died intestate July 30, 1886, and letters of administration were granted on his estate to Samuel R. Tilton, on the 12th day of November, 1886.

Yount, the payee, died testate on the 21st day of November, 1886, and his executor qualified on the 24th of the same month. The administrator of Davis appointed the January term, 1887, of the County Court, which was held on the 17th of the month, for the adjustment of claims, and on that day the note was presented for probate. The County Court rejected the claim and an appeal was prosecuted to the Circuit Court, where, upon a hearing *de novo*, the claim was allowed. The administrator of Davis has brought the case by appeal to this court.

The only defense urged is the statute of limitations. When the note was executed, in 1870, the period of limitation upon such contracts was sixteen years. By the act of 1872 this was changed to ten years; but, as was held in *Smart v. Morrison*, 15 Ill. App. 228, *Blackburn University v. Weir*, 21

Ill. App. 29, and Means v. Harrison, 114 Ill. 248, this act does not in this respect operate upon contracts previously entered into.

When the note was offered for probate more than sixteen years had elapsed since its maturity. In opposition to the apparent bar of the statute of limitations the appellee seeks to interpose Sec. 19 of the act of 1872, which provides that, "if a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executors or administrators after the expiration of that time, and within one year after the issuing of the letters testamentary or of administration," and that "if a person entitled to bring an action die before the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after that time and within one year after his death." These provisions are not found in the statute of limitations in force prior to the act of 1872. We are of opinion that this Sec 19 was, with the rest of the act, designed to affect no contracts existing when the enactment was made, and in view of what has been said in the cases above cited there is no occasion to elaborate upon the point.

These provisions are therefore not applicable to the case. Appellee, however, cites and relies upon the following provision contained in Sec. 101 of the statute of wills of 1845, Gross' Stat., Sec. 109, Chap. 30:

"No action shall be maintainable against any executor or administrator for any debt due from the testator or intestate, until the expiration of one year after the taking out of letters testamentary or of administration, except as is herein excepted, nor shall any person, suing after that time, recover costs against such executor or administrator, unless a demand be proved before the commencement of such suit; but in all other cases, both executors and administrators shall be liable to pay costs as other persons;" and insists that it prevents the statutory bar. This provision was in force up to 1872, when it was repealed by the present statute entitled, "Administration."

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The repealing clause expressly saves and excepts "All suits that may be pending or any rights that may have accrued." As to suits then pending and rights then accrued the provision remained in force.

Rights had then accrued in reference to the contract here involved, and the provision is operative so far as those rights are concerned. By virtue of this provision no action could be maintained against the administrator of Davis for one year from the date of his letters of administration.

The statutory limitation of sixteen years had not fully run when Davis died, but the period was complete on the day after the letters were granted, the days of grace being allowed. From the death of Davis until the appointment of an administrator there was no person to be sued, and for one year after such appointment no action was maintainable. Whether the interval between the death of the debtor and the grant of administration should be deducted from the period of limitation, in the absence of a statutory exception, it is unnecessary to decide. In this connection, see *Baker v. Brown*, 18 Ill. 91; 7 *Wait's Actions and Defenses*, 278; *Arkens v. Bailey*, 5 Eng. 584; *Etter v. Finn*, 12 Ark. 632; *Toby v. Allen*, 3 Kan. 399; *Abbott v. McElroy*, 10 *Smedes & M.* 100. Fortunately for the creditor in this instance, before the statute had completely run, letters of administration were issued, and then by positive provision of statute there was a suspension of the cause of action.

"As a general rule, where a temporary incapacity to sue grows out of some particular provision of a statute, the time during which such temporary disability continues should be excluded from the computation." *Angell on Limitations*, Sec. 63. This is said to form an exception to the rule that after the statute begins to run it will continue, notwithstanding a subsequent disability. 7 *Wait's Actions and Defenses*, 279.

In *Dowell v. Webber* (cited by *Angell*), 2 *Smedes & M.*, 452, it was held that the statute of Mississippi, allowing nine months after publication of letters of administration before suit may be brought against the administrator, has the effect to suspend the general act of limitations and thereby leave the

holder of a promissory note six years within which to sue, besides the nine months within which he is restrained from suing. The court say: "The general rule is that when the statute commences, it runs on notwithstanding any subsequent disability; yet when the disability grows out of some positive statutory provision, it seems but right to exclude the time during which such temporary disability continues," and in support of this view the court cite *Bradford v. McLemore*, 3 Yerg. 318; *Planters' Bank, etc., v. Bank of Alexandria*, 10 Gill & J. 346; *McInder v. Littlejohn*, 1 Ired. 66, and *Moses v. Jones*, 2 Nott & McCord, 259, all of which will be found on examination to be in point.

We hold, therefore, the facts all considered, that when the claim was presented for probate the cause of action was not barred.

It is suggested by appellant that this is not an action against the administrator, and hence the provision under consideration can not apply.

This is a proceeding in which it is sought to probate the note as a claim against the estate, and the defense is that the demand is barred by the statute of limitations, which declares that "all actions founded upon any promissory note * * * shall be commenced within sixteen* years after the cause of action shall have accrued, and not thereafter." If for any reason an "action" is not so barred, the objection to the allowance of the claim is invalid.

We are of opinion that the judgment of the Circuit Court was right, and it will be affirmed.

Judgment affirmed.

GEORGE E. LOAR ET AL.

V.

CHARLES HEINZ ET AL.

Highways—Defective Bridge—Injury to Stock—Negligence of Commissioners.

Loar v. Heinz.

In an action against county commissioners for allowing unsuitable timber to be used in repairing a bridge, thereby causing injury to the plaintiffs' cattle, this court declines to disturb the judgment of the court below in favor of the defendants.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding.

Mr. JAMES W. ENGLISH, for appellants.

Messrs. MORRISON & WHITLOCK, for appellees:

PLEASANTS, J. This was an action on the case, brought by appellants against two of the county commissioners of Morgan county, for allowing unsuitable and defective timber to be used in repairing a bridge, by reason whereof it fell and injured three of plaintiffs' steers which were being driven over it. The cause was tried by the court on the plea of not guilty, and the finding and judgment were for the defendants.

It appears that on report received of the condition of this bridge the commissioners employed one Fletcher to look after it. He had frequently done work of that kind for the county, and the concurrent testimony is that he was "a safe and reliable bridge builder—none better." He reported that it must be repaired at once and that pine was the only lumber to be had for that purpose, but advised them that pine timbers, eight by eight, would be sufficient. Defendant Kennedy was not a carpenter or bridge builder, nor had he any such knowledge or experience as would justify him in relying on his own judgment in such a matter. Heinz had some experience and was of opinion that the timbers proposed would answer the purpose. Like material of the same dimensions had been used for a like purpose in other bridges, county and railroad, and been found sufficient.

The other commissioner, however, opposed its use in this instance, and it was shown that oak timbers of equal and greater dimensions could have been procured at Jacksonville. This

bridge was in that part of the county which had been assigned to the care of Kennedy, and he, with the approval of Heinz, ordered the repairs to be made as proposed by Fletcher.

It was afterward used for about a year and heavy loads were hauled over it. No complaint of it was heard by the commissioners until this accident occurred. Several witnesses testified that these timbers were broken off square, indicating, as they say, that they were "doted," and that if sound, they would not have been sufficient for such a bridge. The defendants both say that these timbers did not and were not intended to support the bridge. It was about forty-five feet in length, and when it fell there were on it five steers whose average weight was 1,500 pounds.

There is no pretense that defendants wilfully or knowingly authorized the use of unsuitable material or methods in making these repairs. What was or was not suitable in these respects was matter of opinion and to be determined by experts. Reasonable care required that it should be submitted to such.

Defendants, for aught that appears, were as liable to use the bridge as the plaintiffs. If it had been their private property and repaired for their own use, as reasonably prudent men they would have so submitted it.

In this respect the case differs from that of *Tearney v. Smith*, 86 Ill. 391, and is more like that of *Weinsteil v. Smith*, 21 Ill. App. 235. If they would be liable for negligence we think the proof of it is not so clear as to warrant us in disturbing the finding of the Circuit Court. At the worst it seems to have been only a mistake of judgment in a matter as to which they were necessitated to exercise it.

The judgment will be affirmed.

Judgment affirmed.

Nance v. Nance.

GEORGE W. NANCE, JR., ET AL.

V.

GEORGE W. NANCE, SR., ET AL.

Husband and Wife—Release of Homestead and Dower—Resulting Trusts—Bill to Enforce and Declare—Evidence—Sec. 2, Chap. 51, R. S.

1. In chancery one defendant is competent to testify in behalf of a co-defendant on a question in the decision of which he has no interest. This rule is not impaired by Chap. 51, Revised Statutes.

2. A wife who releases her right to homestead and dower in the family home in consideration of being paid an adequate share of the purchase money, is reinvested with such rights upon the application of such share in part payment of a new one.

3. Upon a bill filed by the administrator of the wife and certain of her heirs against the husband to declare and enforce a resulting trust, on account of the re-investment of money allowed the wife for her homestead and dower in a farm, it is *held*: That the transaction in controversy simply amounted to the transfer of the wife's rights of homestead and dower from one piece of property to another; and that the bill was properly dismissed.

[Opinion filed May 25, 1888.]

IN ERROR to the Circuit Court of Menard County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. N. W. BRANSON and S. H. BLANE, for plaintiffs in error.

Where real estate is purchased and paid for with funds belonging to two purchasers, but the legal title thereto is taken in the name of but one only of the purchasers, a resulting trust arises, by implication of law, in favor of the other purchaser, to the extent and in proportion to the amount of the consideration paid by him. This trust arises upon the allegation and proof of the ownership of the funds used in making the purchase, and does not depend upon the contract of the parties made anterior thereto, and hence is not affected by the statute of frauds, and may be established by parol evidence. It results from the fact that one man's money has been invested

in land, and the conveyance taken in the name of another. It is immaterial whether the purchase was made and the money paid by the trustee or the *cestui que trust*. This may be done by either without the knowledge of the other. No matter how or by whom done, by mere operation of law a trust is raised in favor of the party whose money was used to purchase the land, either to the whole or his equivalent portion of the land. *Seaman v. Cook*, 14 Ill. 501; *Bruce v. Roney*, 18 Ill. 67; *Smith v. Smith*, 85 Ill. 189; *Loften v. Witboard*, 92 Ill. 461; *Latham v. Henderson*, 47 Ill. 185; *Ward v. Armstrong*, 84 Ill. 151; *Wallace v. Carpenter*, 85 Ill. 590; 4 Kent, 306.

If a husband purchases lands with the separate estate of his wife in his hands and takes the title in his own name, a trust results to the wife. 1 Perry on Trusts, § 127, 2d Ed., and numerous authorities cited.

If a trustee in a resulting trust converts the trust property contrary to his duty, the *cestui que trust* has the option to hold him responsible personally, or to follow the property if not held by a *bona fide* purchaser, without notice, or to pursue the proceeds or the substituted property. 4 Kent, 307; *Seaman v. Cook*, 14 Ill. 501, 505; *Roberts v. Opp*, 56 Ill. 34.

Messrs. T. W. McNEELY and EDWARD LANING, for defendant in error.

CONGER, P. J. This is a proceeding in chancery, instituted by plaintiffs in error, the administrator and a portion of the heirs of Elizabeth Nance, deceased, against George W. Nance, Sr., the husband of said deceased, and the remaining heirs of said Elizabeth, to declare and enforce an alleged resulting trust.

The claim, as made by the plaintiffs in error, is that in 1874 defendant, George W. Nance, Sr., was the owner of sixty acres of land, which he had bought and paid for himself, upon which he resided with his wife, Elizabeth, deceased; that at that time defendant, Nance, sold the land for \$2,400; that his wife, Elizabeth, refused to sign the deed, and thereby release her right of dower and homestead, unless one of the notes for

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\$800, to be given in payment, was made payable and given to her as her own property; that this was done.

Afterward, on March 14, 1876, defendant, George W. Nance, Sr., bought lots four, five and six, in block twenty-nine, in Taylor's addition to the city of Petersburg, for \$2,000, and in paying for the same used the \$800 note given to his wife out of the previous sale, and a note of \$200 on one Shipp, claimed by plaintiffs in error as also being the property of said Elizabeth, thereby, as plaintiffs insist, using his wife's property to the extent of \$1,000, or one-half of the amount paid for the property thus purchased.

Nance and his wife moved into the home standing on this property soon after purchasing it, and it remained their residence and homestead until the death of Mrs. Nance, on April 11, 1881, a period of about five years.

On the 14th of May, 1881, defendant sold these premises for \$1,650. On January 13, 1883, an administrator was appointed upon the estate of the said Elizabeth, and the bill in this case was filed August 31, 1883.

The testimony in relation to the Shipp note is quite unsatisfactory and by no means sufficient to show clearly that it was the property of Mrs. Nance. We think the Circuit Court decided properly in holding the equities of the case were not with the plaintiffs.

We think the whole transaction was a mere exchange of homes upon the part of defendant Nance, assented to by his wife, by which her right of dower and homestead were transferred from the farm to the town property.

When the sale was made of the land, the wife might, if she had doubts as to her husband's financial ability to care for and protect the proceeds arising therefrom, insist that such portion as they might, by agreement between themselves, think a fair equivalent for her interest in the property should be secured to her and placed under her control and management. And when a new home is purchased and this same note is, by the wife, placed in the hands of the husband and used as part of the purchase price, in the absence of other and controlling circumstances, the natural and reasonable presumption

would be that her note was being used to invest her with her rights in a new home in place of the one which she lost when the farm was sold.

The moment Vance became seized of the town property, his wife thereby became vested with her dower interest therein, and when they removed to it, with her rights of homestead; and it would be quite unreasonable to suppose that such a result as is claimed by plaintiffs in error was intended between husband and wife, dealing at arm's length, as strangers, and upon business principles.

It is insisted by counsel for plaintiffs in error that William and A. L. Nance were not competent witnesses on the part of defendant in error, as they were sons and heirs of Elizabeth Nance, deceased, and parties defendant to the bill. We think they were clearly competent. It has always been held in courts of chancery that one defendant was competent to testify in behalf of a co-defendant on any question in the decision of which he had no interest, and chapter 51 of the Revised Statutes, entitled "Evidence and Depositions," has in no manner impaired that rule. *Bradshaw v. Combs*, 102 Ill. 432; *Greenleaf on Ev.*, Sec. 361. These witnesses had no interest in common with their father, but their interest was adverse to him; for whatever could be taken from him and transferred to their mother's estate benefited them as well as the plaintiffs in error.

Again, under Sec. 2 of Chap. 51, they were not disqualified. That section provides: "That no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his *own* motion or in *his own behalf* by virtue of the foregoing section, etc."

While they were parties to the suit they did not testify of their own motion or in their behalf.

They were called by their co-defendant, George W. Nance, Sr., to testify in his behalf and against their own interest. *Unster v. Zimmerman*, 7 Ill. App. 160.

Believing the decree of the Circuit Court in dismissing the bill to be right, it will be affirmed.

Decree affirmed.

Lambert v. Jonte.

JOSEPH LAMBERT

V.

THEODORE JONTE.

28	591
69	33

Sheriff—Special Deputy—Undated Appointment—Sec. 10, Chap. 125, R. S.—Action of Debt on Judgment—Want of Copy—Sec. 17, Practice Act—Default—Reversal—Practice.

1. The record of a judgment upon which a suit is brought is an instrument in writing within the meaning of Sec. 17 of the practice act, and a copy thereof must be filed with the declaration. The absence of such copy is sufficient ground for the reversal of a judgment entered by default.

2. It seems that a date to the written appointment of a special deputy sheriff is not indispensable, where it appears that the appointment preceded the service made by such deputy.

[Opinion filed May 25, 1888.]

IN ERROR to the Circuit Court of Cumberland County; the Hon. W. C. JONES, Judge, presiding.

Mr. W. S. EVERHART, for plaintiff in error.

Mr. HORACE S. CLARK, for defendant in error.

PLEASANTS, J. Action of debt on a judgment of the same court. Judgment herein was rendered by default and the defendant brings the record here by writ of error.

He asks for a reversal on two grounds: First, that the appointment of the special deputy who served the summons was not dated. The statute authorizes the appointment of a special deputy to serve any summons by indorsement thereon substantially in the form prescribed, "which shall be dated and signed by the sheriff." R. S., Chap. 125, Sec. 10. It is claimed that a strict observance of this requirement as to dating is essential.

Manifestly the object of it is to have it appear to the court that the service followed the appointment, as it must in order

to give jurisdiction of the defendant's person. Neither the particular date nor the form in which it is stated can be material; nor does the statute declare the effect or consequence of its omission by the sheriff.

In this case it does not certainly so appear from the papers. The return, however, follows the appointment in the order of indorsement, and shows the service was made by the appointee as "deputy sheriff," and his affidavit appended states that he made it "as appears in the return," which would be perjury, if false, and punishable accordingly. (Sec. 11.)

Regarded as a mere question of fact, then, we should have no doubt upon the evidence thus furnished by the sheriff and his appointee, taken together, in writing and on the writ, substantially equivalent to that of a date given, that the appointment did precede the service; and since the judgment recites that the defendant was duly served with process, and nothing in the record contradicts the recital, we should not be disposed to hold the appointment absolutely void for the want of a date, and the service therefore insufficient. But upon this point it is deemed unnecessary to express a decided opinion, inasmuch as the judgment will be reversed upon the other ground urged.

It appears that this suit was commenced, the service had, and the declaration filed, ten days before the court at which the summons was made returnable, and that the declaration counted on a judgment alleged to have been rendered in 1877; but that no copy of the record of that judgment was filed with it.

That such record is an "instrument in writing on which the action is brought," within the meaning of Sec. 17 of the Practice Act, is settled by the case of *Jefferson v. Alexander*, 84 Ill. 278. See also *Hopkins v. Woodward*, 75 Ill. 65. And that section provides that, "if the plaintiff shall not file his declaration, together with a copy of the instrument in writing * * * on which the action is brought, in case the same be brought on a written instrument, * * * ten days before the court at which the summons * * * is made returnable, the court, on motion of the defendant, shall con-

Lambert v. Jonte.

tinne the cause at the cost of the plaintiff, unless it shall appear that the suit was commenced within ten days of the sitting of the court, in which case the cause shall be continued without costs, unless the parties shall agree to have a trial."

In *Collins v. Tuttle*, 24 Ill. 623, where the declaration and copy of the instrument sued on were not filed, though service of process was had ten days before the term, the Supreme Court held it was error to render judgment by default; that in such case appearance or motion of the defendant was not required in order to have a continuance of the cause, but only to have it continued at the cost of the plaintiff. And in *Herring v. Quimby*, 31 Ill. 153, which was an action on the case and not upon a written instrument, the same rule was held applicable on failure to file the declaration in proper time, and the former case was approved.

Where the action is brought upon a written instrument the statute puts the copy of that instrument in the same category with the declaration, and the consequence of a failure to file both in proper time is expressly declared to be the same as of failure so to file the declaration where the action is not brought upon an instrument in writing. That the requirement applies to the copy was specifically decided in *Jefferson v. Alexander*, *supra*.

For the reason, then, that it was not so filed in this case the judgment will be reversed and the cause remanded.

We notice some other irregularities in the proceedings as they appear in the record. The summons was in debt \$500, and damages, \$300; the declaration set forth a judgment for \$500 and costs, but laid the damages in \$700; and the judgment herein was simply for \$350, without indicating whether it was debt or damages.

Reversed and remanded.

T. & H. SMITH & Co.

V.

CHARLES YARGO.

Attachment--Jurisdiction of County Court--Judgment against Real Property--Statutes.

A County Court has jurisdiction to enter a judgment in attachment against real estate, although the defendant is not personally served.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Cumberland County;
the Hon. JAMES F. HUGHES, Judge, presiding.

Mr. JAS. L. RYAN, for appellants.

Mr. P. A. BRADY, for appellee.

CONGER, P. J. This was a suit in attachment in the County Court, with a levy upon real estate.

The court dismissed the suit upon the ground that it had no jurisdiction in attachment cases where real estate was levied upon, there having been no personal service upon the defendant in attachment.

The action was based upon a promissory note, executed by appellee to appellants; the proceedings were regular, but it is insisted by appellee that County Courts have no jurisdiction to award a judgment in attachment against real estate and that when no personal service is had the court is without jurisdiction, and must dismiss the suit. This seems to have been the view of the court below. Sec. 95, Chap. 37, R. S., says: "The County Courts shall have concurrent jurisdiction with the Circuit Courts in all that class of cases wherein justices of the peace now have, or may hereafter have jurisdiction, where the amount claimed, or the value of the property in controversy, shall not exceed one thousand dollars." * * *

Smith v. Yargo.

This, referring as it does to Sec. 13, Chap. 79, wherein justice's jurisdiction is defined, clearly gives County Courts concurrent jurisdiction with the Circuit Courts in actions upon promissory notes, when the amount does not exceed \$1,000.

By Sec. 202 of Chap. 37, it is provided that "the process, practice and pleadings in said court (County Court) in common law cases shall be the same as in the Circuit Court in similar cases."

The County Court having concurrent jurisdiction with the Circuit Court of this class of cases, *i. e.*, actions upon contracts, is not limited in its method of enforcing its judgment as is a justice, to personal property, but may issue the same process as the Circuit Court.

This power would be inferred from the language of the section giving such courts "concurrent jurisdiction with the Circuit Courts," but we think is clearly given in the section prescribing that the process and practice in County Courts shall be the same as in Circuit Courts in similar cases.

In the attachment act it is provided that in *any court of record* having competent jurisdiction an attachment may issue which shall be levied upon the lands of the debtor. Hence it is only necessary to inquire in the present case whether the County Court had competent jurisdiction over the subject-matter of the suit, it, of course, being a court of record, to determine whether it might proceed under the attachment act to enforce the collection of the debt in all the ways pointed out by the attachment act.

With a justice of the peace it is different; while he has jurisdiction of the same subject-matter within the prescribed amount, the same as the County Court, he is, by the attachment act, limited to issuing writs of attachment against the personalty of the debtor.

The judgment of the County Court will be reversed, and the cause remanded.

Reversed and remanded.

INDIAN GRAVE DRAINAGE DISTRICT
v.
HENRY ROOT.

Drainage District—Judgment against—Motion to Vacate—Levy and Quash Writ of Execution.

1. Where an execution has been erroneously awarded, the proper remedy, after the term, is appeal or writ of error.

2. This court declines to interfere with the action of the trial court denying a motion to vacate a levy and quash the execution at the second term after judgment was obtained.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

Messrs. SPRIGG & ANDERSON, for appellant.

Mr. ALMERON WHEAT, for appellee.

PLEASANTS, J. At the October term, 1886, appellee recovered judgment by default against appellant for \$1,167.55 and costs, and for execution therefor, on service upon one commissioner only, the other two having tendered their resignations, which were indorsed as accepted by the county judge, though their places had not been filled. The execution issued thereon was in the usual form of a *feri facias*, and was levied by the sheriff on the 3d day of February, 1887, upon a lot of ground and pumping works belonging to appellant, but situate outside of the district. At the March term following, another having intervened, the cause was redocketed on motion of the defendant, who thereupon on the same day entered a further motion to vacate the levy and quash the writ of execution, which was denied.

The reasons for the motion, assigned below and relied on here, are (1) that the service was not sufficient to give the court jurisdiction of the defendant, and (2) that the defendant was a municipal corporation and therefore not liable to execution.

Conceding for the purposes of this case that both these propositions are true, the question is, had the court power to allow the motion?

The sufficiency of the service was *res adjudicata* in that court. So also as to plaintiff's right to execution. That he should have it was a part of the judgment. The writ issued was strictly according to the judgment. Why quash it, then? This motion was clearly not an invocation of any equitable power of the court over its own process, nor for cause arising after the judgment awarding it. Aside from the question of jurisdiction, which overshadows all the other proceedings as well, it strikes at the execution directly through the judgment. It is predicated upon error in the judgment, in that behalf distinctly assigned, and asks the court upon review so to hold, and to deny to the plaintiff all benefit of it—accordingly, in effect, to reverse it. And this is asked at the second term after it was rendered.

That the error so assigned was not merely clerical, or other such as the court could correct on motion at a subsequent term, seems clear enough. There was no mistake about it, except as to the law. It was just as the court intended it should be. No fact is presented in support of the motion which did not fully appear by the record. The error, therefore, was not one of fact, which could formerly have been corrected on a writ of error *coram nobis*, and can now be on motion as its substitute, but of law. And for the general rule that for such an error the proper remedy, after the term, is by appeal or writ of error, we hardly need to cite authority. But to show how uniform the practice has been in this State, where execution has been erroneously awarded, we transcribe from the brief of counsel, which we have verified, the following: *City of Morrison v. Hinkson*, 87 Ill. 587; *City of Paris v. Cracraft*, 85 Ill. 294; *Village of Kansas v. Juntgen*, 84 Ill. 360; *City of Elgin v. Eaton*, 83 Ill. 535; *City of Cairo v.*

Allen, 3 Ill. App. 398; City of Virden v. Fishback, 9 Ill. App. 82; Watson v. Abry, 2 Ill. App. 280. Others might be cited.

The only departure from this course, so far as we are advised, was in the case of City of Chicago v. Hasley, 25 Ill. 595. In the report of that case it is stated that the execution was issued in August and the motion to quash entered in June of the same year, a misprint, probably, which leaves it uncertain when, in reference to the judgment, the motion was in fact entered. Under the practice, not uncommon at that time, of getting an order for execution instanter upon a special showing, it might have been during the judgment term. But however that was, it is evident that the question here considered was not raised by counsel nor discussed by the court. The opinion states that the "only question" was, "can the ordinary writ of *fieri facias* legally be issued against a municipal corporation on a judgment for debt or damages recovered against it," and no other is noticed. Possibly the importance of that question and of its early decision induced the overlooking or waiving of the other. Therefore, and in view of later expressions, we are inclined to think it ought not be regarded as authority upon the one here involved, and that the motion was rightly denied.

Affirmed.

MATTHEW PARKER ET AL.

V.

JOHN W. CAIN.

Creditor's Bill—Fraudulent Conveyance.

A conveyance by a debtor solely to secure a future support is fraudulent as against creditors.

[Opinion filed May 25, 1888.]

Parker v. Cain.

IN ERROR to the Circuit Court of De Witt County; the Hon. CYRUS EPLER, Judge, presiding.

Mr. R. A. LEMON, for plaintiffs in error.

MESSRS. FULLER & INGHAM, for defendant in error.

CONGER, P. J. This is a creditor's bill to set aside a certain conveyance as fraudulent.

On the 14th of March, 1885, Julia A. Parker was the owner of a life estate in certain lands, of which her three children, Edwin Parker, Flora Parker and Nettie Rockhold, *nee* Parker, were the owners of the fee, and on that day Mrs. Parker conveyed by quit claim deed her life estate in the property to appellant, Matthew Parker.

The reason for so doing, and the consideration upon which such conveyance was based is shown by the following agreement executed by the parties:

“EXHIBIT A.”

“Whereas, Julia A. Parker has this day conveyed to me, Matthew Parker, her life estate in certain real estate, more particularly described in a quit claim deed of this date, from her to me, and this day filed for record in the recorder's office of De Witt county, Illinois, (which see) for which I am to pay her the sum of one hundred and fifty dollars per year, during her natural life, or until the times hereinafter mentioned, for one of which annual payments I have this day given my note, due March 1, 1886, now this agreement witnesseth, that if the said Julia A. Parker shall be living on the 1st day of March, 1886, I shall give a like note for \$150 to her, due in one year from that date, with eight per cent. interest, and on the 1st day of each succeeding March, if she shall be living, until March 1, 1888, inclusive. And on March 1, 1889, I agree to execute a quit claim deed to Edwin Parker, for the undivided one third of said real estate, and on said last mentioned date, if said Julia A. Parker shall be living, I am

to execute to her my note for \$75, due in one year from that date, with eight per cent. interest, and on March 1, 1890, I agree to execute to Flora Parker a quit claim deed for the remaining undivided one-third of said real estate, I having already executed a quit claim deed to Nettie Rockhold, *nee* Parker, for the undivided one-third of said real estate. It is expressly understood and agreed that in case of the death of the said Julia A. Parker in the meantime, then no further note or notes shall be given, and this contract shall be at an end and all liability shall cease.

“ The consideration of said quit claim deed from said Julia A. Parker to said Matthew Parker is the consideration for this agreement. Dated this 14th day of March, 1885.

“ MATTHEW PARKER,
“ JULIA PARKER.”

March 20, 1885, six days after such conveyance was made, appellee, John Cain, recovered a judgment against Julia Parker for groceries and supplies furnished her during the years 1882, 1883 and 1884, and having failed to make his debt by an execution, filed the bill in this case.

From a careful consideration of the foregoing agreement we have reached the conclusion that the conveyance made by Mrs. Parker can not be sustained, for the reason that it was made solely to secure a future support for the grantor. It provides for the payment to Mrs. Parker of the sum of \$150 per annum for the years 1886, 1887, 1888, 1889, and for the year 1890 the sum of \$75, provided Mrs. Parker shall so long live, and should she die, nothing thereafter. There is no absolute liability upon Parker to pay anything, except the first payment for which he executed his note, unless Mrs. Parker should remain alive.

Had the various payments been made to depend upon no contingency, the mere fact that they were to be made at a subsequent time would in no way have tainted the transaction.

She had a right to sell her property for an honest and fair consideration, as the law deems such consideration so received as standing in the place of, and representing to her creditors,

Aultman & Co. v. Ohl.

the property sold. But in this transaction Mrs. Parker, beside the first note, gets nothing but a promise to pension her for a certain number of years, if she lives, and if she dies her estate is to get nothing. *Annis v. Bonar*, 86 Ill. 128; *Lawson v. Funk*, 108 Ill. 502.

The decree of the Circuit Court will be affirmed.

Decree affirmed.

C. AULTMAN & Co.

v.

HENRY OHL ET AL.

Negotiable Instruments—Note—Evidence—Warranty—Contract of Sale—Wairer.

An error in the exclusion of evidence, which has worked no injury to the appellant, is not sufficient ground for reversal.

[Opinion filed May 25, 1888.]

APPEAL from the County Court of Champaign County; the Hon. J. W. LANGLEY, Judge, presiding.

Mr. W. A. PERKINS, for appellants.

Messrs. RAY & SLATSON, for appellees.

CONGER, P. J. This was a suit brought upon two promissory notes given in payment for a mowing machine, and the defense set up was that the machine would not work as represented and was worthless. Verdict and judgment for defendants.

The principal error complained of by appellant is the refusal by the court to permit the warranty printed upon the back of the order given by appellees to appellant for the machine, to be read to the jury.

The order was as follows:

"C. AULTMAN & Co., Canton, Ohio.

"TOLONO, ILLINOIS, June 26, 1885.

"The undersigned has this day bought of your agent, W. H. Vanaslen, at Tolono, Illinois, one Buckeye Dropper and Mower, combined, to be delivered, if possible, at (insert plain and full description of machine wanted) Tolono, on the 30th day of June, 1885, where he agrees to receive the same and pay freight from Canton, and at the same time pay to your order one hundred and fifteen dollars as follows, cash, \$..... and notes with approved security, bearing interest at seven per cent. as follows:

"One for \$38.35, due Jan. 1, 1886; one for \$38.35, due Oct. 1, 1886; one for \$38.30, due Jan. 1, 1887; one for \$..... due 188 . The machine above ordered to be subject to warranty printed on back of this order.

"HENRY OHL.

"Post office, Pesotum. County, Champaign, State of Illinois."

Copy of the warranty on the back of the order refused by the court to go to the jury as evidence:

"WARRANTY.

"The machine herewith ordered is warranted, with proper usage and management, to work equal to or better than any first class machine made for doing the same work. If, in one day's trial, it shall not perform as above warranty provides, the purchaser agrees to notify C. Aultman & Co., or the agent within named, and allow them time to get to the machine and remedy the defect, if there be any (if it be of such a nature that a remedy can not be suggested by letter), the purchaser rendering necessary and friendly assistance. If the machine can not be made to fill the warranty, it shall be returned by the purchaser to the place where received. More than one day's use of said machine shall be considered an acceptance of it, and this warranty shall not be binding if the machine shall be delivered before settlement shall have been made for same, as stipulated."

Van Duyn v. Aultman & Co.

The court, we think, erred in not permitting the warranty to go to the jury, that they might determine from all the evidence in the case whether it formed a part of the contract between the parties or not. If any misrepresentations or concealments were made at the time the order was signed, by appellants or their agents, it might be that the jury would be authorized to say it was no part of the contract signed by appellee, but it, together with all the circumstances attending the execution of the order, should have gone to the jury.

But we do not think this erroneous ruling of the court worked any substantial wrong to appellants, for the reason that appellee did, within two or three days after receiving the machine, report to appellant's agent the fact that the machine would not work, and from that time on, he kept it at appellant's request, and there was therefore upon the appellant a waiver of the terms contained in the warranty.

The judgment of the County Court will be affirmed.

Judgment affirmed.

GILBERT A. VAN DUYN AND GEO. B. HEMENWAY,
PARTNERS,
V.
AULTMAN & Co.

Agency—Contract—Sale of Farm Implements—Jurisdiction—Evidence.

In an action brought by a manufacturer of farm machinery, upon an agency contract to recover the value of machinery sold, it being alleged that the purchase price was lost because of the failure of the agents to obey the instructions of the company, this court affirms the judgment for the plaintiff, the evidence being sharply conflicting and there being no substantial error in the instructions.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Sangamon County; the Hon. J. A. CREIGHTON, Judge, presiding.

Messrs. BROWN, WHEELER & BROWN, for appellants.

Messrs. PATTON & HAMILTON, for appellee.

CONGER, P. J. Appellants were the agents of appellee for selling the latter's machines. A machine was sold to one De Gouveia, and delivered to him without taking such security as was required by the contract of agency between appellants and appellee. The machine was never paid for, and the price was wholly lost to appellee, who thereupon brings this suit against appellants and seeks to recover upon the ground that it was lost by the failure of appellants to perform their contract of agency in taking proper security from De Gouveia before delivering the machine.

Appellee recovered a verdict for \$1,777.52, and a remittitur was entered for \$373, whereupon a judgment was rendered for \$1,402.52.

The vital and contested question is, did appellants or appellee, by its general agent, Mickle, make the sale to De Gouveia. The evidence upon this point is quite contradictory, and consists of many circumstances upon which reliance is placed by the parties to strengthen the direct statements of the witnesses.

We have examined it all with care, but can see no good purpose to be subserved by referring to it at length.

We can not say that the jury were not warranted by it, in reaching the conclusion they did.

The fourth instruction does not, as we construe it, give the jury to understand that if Mickle sold the machine, still the sale should be considered as made by appellants, unless Mickle had authority to waive the terms of the contract. It is silent as to who made the sale and only instructs the jury as to when and under what authority Mickle could vary the terms of the contract, and if, as insisted, it was not applicable to any issue being tried, we can not see that it was calculated to do appellants any injury.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

Weir & Creig v. Dustin.

WEIR & CREIG
v.
WILLIAM M. DUSTIN.

Attachment—Fraudulent Conveyances—Assignment.

A conveyance by a debtor in failing circumstances, who does not desire to make a general assignment, made in good faith in satisfaction of a particular indebtedness, is not fraudulent as against other creditors.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Logan County; the Hon. G. W. HERDMAN, Judge, presiding.

Messrs. FRANKLIN P. SIMMONS and S. L. WALLACE, for appellants.

Messrs. BLINN & HOBLIT and BEACH & HONDETT, for appellee.

To sustain an attachment on the ground that the debtor is about fraudulently to conceal, assign or otherwise dispose of his property or effects so as to hinder or delay his creditors, a fraudulent intent must be proved. *Shove v. Farwell*, 9 Ill. App. 256; *Drake on Attachments*, Sec. 74, p. 52; *McPike & Fox v. Attwell*, 34 Kan. 142; *Milliken v. Dart*, 26 Hun, 24; *Dunn v. Jackson*, 59 Ala. 203.

A debtor, who is also a member of a firm, may convey his individual property to pay or secure firm debts, and his individual creditors can not complain. *McIntyre v. Yates et al.* 104 Ill. 491; *Ladd v. Griswold*, 4 Giln. 25; *Hapgood v. Cornwell*, 48 Ill. 64; *Williams v. Adams*, 16 Ill. App. 564; *Bump on Fraudulent Conveyances*, 383; *Kirby v. Schoonmaker*, 3 Barb. Ch. 47; *Lindley on Part.* 624.

CONGER, P. J. This was a suit in attachment brought by appellants against appellee. The affidavit upon which the

writ was predicated charged appellee with the fourth, fifth, sixth, seventh and eighth grounds mentioned in section one of the attachment act. Upon the trial the issue upon the indebtedness was found for appellants, and judgment was rendered in their favor for \$1,663.40.

A plea was filed denying all of the alleged grounds for issuing an attachment, and upon the issue formed thereon appellants were unsuccessful.

In January, 1886, appellee formed a partnership with Charles A. Nicholson, and his son, William L. Dustin, to carry on the banking business in Lincoln, Illinois, under the firm name of William M. Dustin & Company.

In July, 1886, appellee, as an individual, guaranteed to appellants certain purchases to be made of them by a beef company, in Montana, by which the indebtedness was created for which this suit was brought, and about which no question is made in the record.

About October 2, 1886, the banking firm of William M. Dustin & Co. failed, and on November 8, 1886, made an assignment, under the assignment laws of this State, to Aaron B. Nicholson.

On the 15th of November, 1886, appellee executed a deed by which, for the expressed consideration of \$5,000, he conveyed "to said Aaron B. Nicholson, assignee of William M. Dustin & Co., insolvent debtors, for the use and benefit of all the depositors of William M. Dustin & Co., the following described real estate, to-wit: (describing three lots) intending hereby to vest in the said Aaron B. Nicholson, assignee, the same title in and to said real estate that he has in the estate of said William M. Dustin & Co., for the sole use and benefit of their depositors, situated in the county of Logan."

There can be no question, from the evidence, that appellee was indebted to the firm of William M. Dustin & Co., and that the conveyance was made in good faith on the part of appellee to secure the partnership creditors, or rather the depositors in the bank. That there was no fraud, in fact, intended or accomplished, we think the jury would be fully warranted, from the evidence, in finding.

It is insisted, however, that the conveyance of November 15, 1886, was fraudulent in law, as being in violation of the general assignment law of this State; that it was in reality attempting to make an assignment, and at the same time preferring creditors.

We can not assent to this proposition. The deed was not a voluntary assignment for the benefit of creditors generally, but it was a conveyance of specific tracts of land to Nicholson for the benefit of specified creditors, to wit, the depositors in the bank of William M. Dustin & Co. This he clearly had the right to do, as we said in the case of *E. D. C. Haines v. James E. Chandler et al.*, 26 Ill. App. 400: "The act concerning voluntary assignment does not oblige an insolvent debtor to make a general assignment in conformity with its provisions in order to appropriate his estate, or any specific portion of it, to the payment of a particular debt, nor prevent his preference of a particular creditor, by any means that were previously lawful, excepting only a general assignment for the benefit of creditors. He may confess a judgment, execute a mortgage, legal or equitable, or turn out all or any of the specific property at an agreed valuation, if done in good faith for the satisfaction of one debt, though others should be thereby left unprovided for."

In *Schroeder v. Walsh*, 120 Ill. 411, it is said: "In the absence of any bankrupt law or statute to the contrary, the law is well settled that a debtor in failing circumstances, not seeking the benefit of the general assignment law, may prefer one creditor to another equally meritorious, if done in good faith."

Appellee, by making this deed, was not seeking the benefit of the general assignment law; no attempt was made to conform to its requirements, but a direct conveyance of specific property for the benefit of specific creditors was made. Nicholson being the assignee of the insolvent bank, there would seem to be the utmost propriety in conveying the property directly to him. No trust, secret or otherwise, was reserved for the benefit of the grantor, and we can see no reason for holding the conveyance invalid.

There being no fraud in law in executing this conveyance, it is unnecessary to notice the other question discussed at length by counsel, *i. e.*, whether a transaction which is done in good faith by a failing debtor, without any fraudulent intent upon his part, but which the law may deem fraudulent, will authorize an attachment.

As we hold the deed was not fraudulent, nor void in law, and the evidence fully justified the jury in finding that no fraudulent intent existed in executing it, it is unnecessary to discuss this question further.

The instructions of the court below were in accordance with the views herein expressed, and it is therefore unnecessary to notice the objections to them in detail.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

LUCY J. MURRAY
V.
BENJAMIN D. STRANG.

Administration—Exception to Report—Life Insurance—Benevolent Association—Beneficiaries—"Legal Representatives."

Upon exceptions filed to a report of an administratrix by a creditor of the estate of her deceased husband, touching her failure to charge herself with the proceeds of a certificate in a benevolent association of which her husband was a member, it is *held*: That, in accordance with the intention of the parties, the words "legal representatives" are to be construed as referring to the widow, orphans and heirs of the deceased; and that the administratrix is not chargeable as such with the proceeds of said certificate.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Green County; the Hon. G. W. HERDMAN, Judge, presiding.

Murray v. Strang.

Messrs. JOHN W. STARKEY and BROWN & KIRBY, for appellant.

A corporation, public or private, possesses and can exercise no other powers than those specifically conferred by the act creating it, or such as are incidental or necessary to carry into effect the purposes for which it was created. *Caldwell v. City of Alton*, 33 Ill. 416; *Chicago v. Rumpff*, 45 Ill. 90.

The contract of the corporation must be construed so as to carry out the purposes for which it was organized. *Benefit Association v. Sears et al.*, 114 Ill. 108; *Covenant Benefit Association v. Spies*, 114 Ill. 463-468.

The by-laws and constitution of an association are evidence for the purpose of determining the character of the contract made with its members. *Covenant Benefit Association v. Spies*, 114 Ill. 463; *Highland v. Highland*, 109 Ill. 366.

The nature and purposes for which a corporation was created is the controlling consideration in determining its by-laws, and if they are foreign to its character and a departure from its purposes, they are void. If otherwise, and they are in harmony with the general laws of the State, they are valid. *People v. Chicago Board of Trade*, 45 Ill. 112.

Associations and societies which are intended to benefit widows, orphans and devisees of deceased members thereof, and members who have received a permanent disability and where no annual dues or premiums are required, and where members shall receive no money as profit or otherwise, except for permanent disability, shall not be deemed insurance companies. Revised Statutes, Chap. 32, Sec. 31; Opinion of Attorney General, December, 1884, page 13; *Commercial League v. People*, 90 Ill. 166-172.

The rules and regulations of a mutual society designed to secure, upon the death of a member, payment of moneys to those who are dependent upon him, should be liberally construed by the court, so as to effect its benevolent purpose, and should not be so construed as to defeat that purpose, if their language admits of any other reasonable construction. *Ballou v. Giles*, 7 N. W. R. 273.

Upon the death of a member of any such association, the administrator of the deceased member will in no case be entitled to moneys from said benefit fund for the creditors of the deceased. *Diedrich et al. v. The Madison Relief Association*, 45 Wis. 79; *Ballou v. Giles*, 7 Northwestern Rep. 273; *Hodges' Appeal*, Chicago Legal News, August 21, 1880, page 421; *Kentucky Masonic Mutual Life Insurance Company v. Miller, administrator*, 13 Bush, 480.

Even if the by-laws of such an association should provide that the payment shall be made to his executor, such executor would hold the fund as trustee for the beneficiaries named in the charter, but not as general assets. *Daniels, executor, v. Pratt*, 143 Mass. 216; *American Legion of Honor v. Perry*, 140 Mass. 580.

The term "legal representatives" does not always mean administrator or executor. It may mean heirs, next of kin or descendants, and sometimes assignee or grantee. The sense in which the term is to be understood depends upon the intention of the parties using it, and is to be gathered, not always from the instrument itself, but as well from the surrounding circumstances. *Loos v. John Hancock Mutual Life Insurance Co.*, 41 Mo. 538; *Delaunay v. Bennett*, 4 Gilm. 454; *Morehouse v. Phelps*, 18 Ill. 472; *Warnecke v. Lembea*, 71 Ill. 91; *Bowman v. Long*, 89 Ill. 19.

Mr. MARK MEYERSTEIN, for appellee.

We think that the questions at issue must be determined from the certificate of membership alone, and that all extrinsic evidence as to the object and purpose of the said Masonic Benevolent Association, as shown by the alleged constitution and by-laws, is wholly inadmissible to change the contract as set forth in that certificate of membership; and we candidly also state that it is now our judgment, that all the other extrinsic evidence introduced for the purpose of showing what was Murray's intention when he procured this life indemnity, is equally inadmissible. We however insist, that if all this extrinsic evidence is a proper and legitimate subject to be considered by the court in determining questions of fact, it largely preponderates in favor of appellee.

Murray v. Strang.

We contend that the certificate of membership in evidence is nothing more nor less than a policy of insurance on the life of John H. Murray, deceased, issued in his lifetime. The Illinois Masons' Benevolent Society v. Charles E. R. Winthrop, Adm'r, etc., 85 Ill. 537; Masons' Benevolent Society v. Elizabeth Baldwin, 86 Ill. 479.

We claim that this certificate of membership is a contract entered into by the Masonic Benevolent Association of Central Illinois on the one part, and John H. Murray on the other part. By this contract the said association in substance promises and agrees, for a good and valuable consideration, to and with the said John H. Murray, his heirs, executors, administrators and assigns, well and truly to pay or cause to be paid to the devisees or legal representatives of the said John H. Murray, after due notice and satisfactory evidence of the death of the said John H. Murray, a certain amount of money.

The controversy in this case is not between that association and the payees of that certificate.

We contend that the term legal representatives in this policy means none other than the administrator or executor of the estate of John H. Murray, deceased.

While it is undoubtedly true that the term legal representatives may sometimes mean heirs, next of kin, assignee or even grantee, yet we claim it to be an inflexible rule of law, that the administrator or executor is the legal representative of the decedent as to all the personal estate. *Louis Warnecke et al. v. Lembca*, 71 Ill. 91.

Legal representative or personal representative in the commonly accepted sense means administrator or executor. *Id.* p. 92.

WALL, J. John H. Murray, of Roodhouse, in Greene County, Illinois, died intestate, leaving him surviving a widow, Lucy J. Murray, and one child, a son.

Prior to his death, and on the 28th day of November, 1884, he had taken out a certificate of membership in the Masonic Benevolent Association of Central Illinois. By said certificate of membership, the said association did promise and agree

to and with the said John H. Murray, his heirs, executors, administrators and assigns, well and truly to pay or cause to be paid to the devisees or legal representatives of the said John H. Murray, within thirty days after due notice and satisfactory evidence of the death of the said John H. Murray, and proof of interest, should be received at the office of the association, the amount of five thousand dollars, or one dollar for each member of the association at the time of his death, less the expense of collecting the same, not to exceed ten per cent.

Lucy J. Murray, the appellant, was duly appointed administratrix of the estate of said decedent, and collected and received from the said association the sum of \$3,901.05. The said administratrix filed her report in the Probate Court of Greene County, Illinois, as administratrix as aforesaid, not charging herself with the said sum of \$3,901.05. Benjamin D. Strang, a creditor of the estate, filed his exceptions to the administratrix' report, objecting to the same, among other reasons, because she had failed to charge herself with the said sum of \$3,901.05.

Upon a hearing in the County Court of the exceptions to the report of the administratrix, the court overruled the objections and approved the report; whereupon Benjamin D. Strang took an appeal to the Circuit Court.

Upon the trial of said appeal in the Circuit Court, before the judge, without a jury, the court ordered that the said exception to the report of the administratrix be sustained, and that all other exceptions to said report be overruled, and that the said Lucy J. Murray, as administratrix, charge herself with all money received by her from the said Masonic Benevolent Association as part of the assets of the personal estate of John H. Murray, deceased, to be applied and paid out by her, as such administratrix, under the direction of the County Court of Greene County, Illinois, to reverse which order and judgment the said Lucy J. Murray brings her appeal to this court.

The question is as to the true construction to be given to the term "legal representatives" as used in the certificate of

membership. By that instrument the company did "promise and agree to and with the said John H. Murray, his heirs, executors, administrators and assigns, well and truly to pay or cause to be paid to the devisees or legal representatives of said John H. Murray," etc. It is to be noticed that the term "heirs, executors, administrators and assigns," are used, and also the terms "devisees or legal representatives" as though the two phrases did not necessarily refer to the same persons, and as a matter of law they do not, though it is true that the term "legal representatives," when referring to those who are entitled by law to the personal estate of a decedent, if there is nothing in the contract or circumstances to indicate otherwise, uniformly mean executors and administrators.

In ascertaining the meaning to be given to the expression the intention of the parties may be gathered not solely from the instrument but in part from the concomitant circumstances, the existing state of things and the relative situation of parties to be affected. *Bowman v. Long*, 89 Ill. 19; *Johnson v. Van Epps*, 110 Ill. 551; *Redfield on Wills*, Vol. 2, p. 402, *et seq.*

By the express language of its constitution the object of the company or association issuing the certificate was to provide pecuniary aid "for the widows, orphans, heirs and devisees of deceased members and for no other purpose whatever." It was not the ordinary case of life insurance offered by an insurance company to the public, but it was rather for the special use and benefit of persons belonging to the Masonic order and was limited to the pecuniary aid of their widows, orphans and devisees. The certificate, as understood by the company or association issuing it, must have been intended to carry out the object for which the association was instituted and the words in question were, no doubt, understood by the insurer in the sense contemplated by the constitution and in harmony with its objects.

Were they so understood by Murray, the insured?

He had shown him a copy of the constitution and was, no doubt, familiar with the designs and purposes of the organi-

zation, and was, probably, advised of the particular nature of indemnity offered by it. He stated at the time that he intended to take out a policy for the benefit of his wife and child.

It is true, there is some evidence, consisting of declarations made at an earlier date, tending to show a different purpose, but after carefully considering the whole case as it appears of record, we are inclined to hold that, according to the intention of the parties to this contract the terms "legal representatives" here mean, those who are such in the contemplation of the constitution of the company, viz., the widow, orphans and heirs of the deceased. It follows that the administratrix could hold the money, not for the benefit of creditors or of the estate generally, but for those who are the beneficiaries intended in the certificate. The judgment will be reversed and the cause remanded, with instructions to overrule the exceptions to the report and to affirm the judgment of the County Court.

Reversed and remanded.

CITY OF BLOOMINGTON

V.

LINUS GRAVES.

Municipal Corporations—Excavation and Obstruction of Street—Penalty under Ordinance—Possession—Evidence.

1. In a prosecution under an ordinance by a municipal corporation to recover a penalty for excavating and obstructing a street, wherein the plaintiff's claim rests solely upon the extent of actual possession shown, its proof of such possession of the strip of ground in question is not so convincing as to require the reversal of the judgment for the defendant.

2. In such cases title deeds, maps and plats are admissible in evidence to show the extent of the defendant's possession, but not to show the title which is not involved.

[Opinion filed May 25, 1888.]

City of Bloomington v. Graves.

APPEAL from the County Court of McLean County; the Hon. C. D. MYERS, Judge, presiding.

Mr. A. E. DEMANGE, for appellant.

If the city was in such possession of the street, no matter whether that part of it sought to be taken by appellee was legally a part of it or not, it was bound to keep the whole street clear of obstructions and in a safe condition for public travel, and would have been liable for all damages caused by the excavations or obstructions placed there by appellee. Dillon on Munic. Corp. (3d Ed.), Vol. 2, Sec. 1009, and cases cited.

Such a liability certainly implies the corresponding right to protect such possession with all the police power at its command. City of Chicago v. Wright, 69 Ill. 322.

In addition to its police power it seems clear that its possessory rights must be equally as strong as those of a natural person, upon whom no public duty rests. City of Chicago v. Wright, *supra*.

It also seems clear that when the burden of liability is imposed on municipal corporations for all damages caused by obstructions on ground in their possession used as public streets, that in prosecutions like this, for placing such obstructions thereon, such corporations should be protected by the same rules of evidence as pertain to actions of forcible entry between individuals.

In such cases the law is well established that the defendant can not interpose evidence of title in defense. Dillon on Munic. Corp. (3d Ed.), Vol. 2, Sec. 639; McCartney v. McMullin, 38 Ill. 237; Smith v. Hoag, 45 Ill. 250; Thompson v. Sornberger, 59 Ill. 326; Doty v. Burdick, 83 Ill. 475.

Messrs. FIFER & PHILLIPS and Mr. E. M. PRINCE, for appellee.

Title deeds may be read in evidence in actions of forcible entry and detainer for the purpose of showing the extent of possession; and proof of boundaries is competent for the same purpose. Brooks v. Bruyn, 18 Ill. 539; Huftalin v. Misner, 70 Ill. 205; Pearson v. Herr, 53 Ill. 144.

If the city, instead of prosecuting Graves under its ordinances for a penalty, had brought its action of forcible entry and detainer for an invasion of its possession, which would, we concede, raise the same legal question, it would then be incumbent on the city (it having no paper title covering the place) to show an actual possession of the place where Graves put the obstruction, and a mere constructive possession would not be sufficient. *Thompson v. Sornberger*, 59 Ill. 326; *McCartney v. McMullen*, 38 Ill. 237.

"If a party does not make the entry under a paper title, his possession is adverse only to the portion actually occupied.
* * * But where a party enters under a conveyance of a single tract of land, his actual occupation of a part, with a claim of title to the whole, will inure as a possession of the entire tract. In such case the possession is regarded as co-extensive with the description in the deed." *Turney v. Chamberlin*, 15 Ill. 271; *Dills v. Hubbard*, 21 Ill. 328.

The same principle of law applies in determining what manner of possession will sustain an action of trespass, which this action against Graves virtually is. If one owns 160 acres of land in a body, holding a deed therefor, his actual possession of forty acres of the land under his deed, will, if the other three forties are unoccupied and vacant, draw to him the possession, in law, of the whole. *Whitford v. Drexel*, 118 Ill. 600.

But if the party has no deed to the 160 acres, then he could only sustain an action of trespass to the part of which he shows himself in actual possession. *I. C. R. R. Co. v. I. & I. C. Ry. Co.*, 85 Ill. 211; *C. & N. W. Ry. Co. v. Hoag*, 90 Ill. 339.

PLEASANTS, J. Appellee had charge of the grounds of the cemetery association, which lie north of and adjoining Lincoln street in the city of Bloomington. Having dug a line of post holes and begun to erect a fence six or seven feet south of the old south fence which had been standing for about eighteen years, he was fined by the police magistrate, on a complaint under the ordinance, for excavating and obstructing "a public

street" of said city without permission. On appeal to the County Court the verdict was for the defendant in each of two trials, on the last of which judgment was entered, and from that judgment this appeal is prosecuted.

Appellant relied wholly on alleged actual possession up to the old fence. It claimed that these post holes were dug in a gutter cut by the city, in grading up the street, at a proper distance from the fence to admit of a sidewalk of the usual width between them, and that this strip was so used, though no artificial walk had been laid thereon.

Appellee claimed they were not in the gutter, but north of it, though very close, and that the gutter was the limit of the city's actual possession.

The proof of actual possession of this strip by the city, apart from the fact that people passed over it, is to our minds by no means convincing. Several witnesses say, in general terms, it did some grading there for a sidewalk, but none of them identify the persons who did it, and the only work specified was a little filling at a low point where a box culvert crossed the street, which appellee and his hired man say they did, and with a view to making a fence. One says it dug out some stumps, but on cross-examination admits he did not see it done, and does not know it was done under direction of the city. Some of appellant's witnesses testified that nothing was done on it; that it was as nature left it. Defendant testified that he had been in charge of the cemetery grounds ever since 1861, and had known Lincoln street from the time it was first laid out; that the first fence on the south side of the cemetery was built in 1831 or 1832; that it was a few feet south of the present fence at its west end; that its location was changed in 1869 under his direction, and that the city never did any work upon the strip in question. That for many years persons and animals had passed over it as they had occasion, and so had made a narrow, crooked path thereon, was proved and admitted; but appellant made no claim of dedication or estoppel against the association, and defendant insisted that this use was made of it only because the land south of the cemetery was all open, and the part along the fence was the higher and

better pathway in muddy times. In the summer of 1884, or between that time and the commencement of this suit, the city had put in cinders and laid a brick walk on the south side of the street, since which time passage over this strip has been almost entirely discontinued.

It is said it was "left for a sidewalk;" that the street was graded up and the gutter cut "with reference to" that use of it. But we apprehend the city could not acquire actual possession of it by leaving it for any purpose, or by any dealing with other land with whatever reference to this. And we think that upon all the oral testimony on the subject the jury might well have believed that the city never did any work upon it, and that under the conditions shown, the use made of it as a passage way would have been just the same if there had been no street nor any pretense of one including it.

Besides the oral evidence, however, appellee was permitted, over objection, to introduce certain maps and plats in connection with the testimony of surveyors, to prove that according to the recorded and accepted plat of the city the north line of Lincoln street along the cemetery grounds was the half section line, which was also the south boundary of those grounds, and that the gutter spoken of was on that line.

From these it would appear that J. E. McClan formerly owned the land immediately west, and extending south, and also that immediately south of the cemetery; that his second addition to Bloomington was laid out in 1858, on the land west and extending south, with Lincoln street fifty feet in width, and having its north line north of the half section line; that in 1869 he laid out his third addition on the land immediately south of the cemetery, through which Lincoln street was continued east, of the same width, but with its north line coincident with the half section line, thus making a jog at the southwest corner of these grounds; and that the gutter mentioned is on that line.

The admission of this evidence and the instruction given to the jury in reference to it are the principal errors here alleged.

In an action of trespass *quare clausum fregit* or of forcible entry and detainer, to which this is likened, the question of title, as such, is not involved, but only that of possession.

Where the land is entirely vacant at the time of the alleged trespass or forcible entry, either party may introduce his title papers, because in such case title draws to it a constructive possession; and so also where it is actually occupied in part, the party so occupying may introduce them, because in such case they fix by conclusive presumption the extent of his actual possession, which in either case is sufficient for all the purposes of the action. But where the plaintiff rests his claim of right solely upon actual possession, it will be established only to the extent of such possession shown, without the aid of presumption from title; and therefore the introduction of his title papers by the defendant would be useless and improper. If there is no evidence tending to show it, there is nothing for him to overcome. If there is any, his title papers—serving in any case to show only constructive possession, or by presumption the extent of his actual possession—would have no tendency to overcome it; for there can be no constructive, or presumptively actual possession where there is in fact actual possession. All this is too well settled and known to require the citation of any authority.

But it will be observed that in this case the defendant did not introduce his own title papers. It was conceded on the one hand that the cemetery association owned the land next north of the street, wherever the dividing line might be, and on the other that the street included whatever was actually occupied as such without regard to paper title. The question made was not one of title, or of constructive or presumptively actual possession, but of the location and extent of what was in fact actually occupied as a street.

It is to be further observed that the case is somewhat peculiar if not exceptional. As already stated, the actual possession to be proved by the appellant was of a particular and limited kind, or for a particular and limited purpose, as a street. This might be shown, not only as in other cases by any work done on the land by the city, but also, as not in others, by the mere passage over it of those who, as between these parties, were third persons, without explanation; and although evidence of the latter kind might be weak from the

infrequency of such passages or from the uncertainty whether the passers so used it as of public right or only because it was open, convenient and unforbidden ground, it would still be admissible for what the jury might consider it worth, and would be hard to explain. Being unnamed, it would be impossible for the defendant to produce all such persons and show by them directly how they regarded and used it.

He must, therefore, allow the fact to go without explanation or resort to other evidence for that purpose. Any circumstance which of itself or in connection with others in evidence would tend to show they did not consider it a street or use it as of public right, would be competent.

Then if it appeared that until the street was improved as at the commencement of this suit, all the land south of the cemetery fence was open and passed over by all who saw fit; that the part next to the fence was naturally better adapted to such use than the other; that the city had worked up to and including the north gutter, but no further, although there was no material obstacle to prevent, and had laid a brick sidewalk south of the other, it seems to us the fact that the north gutter was the boundary in that direction of the street as platted, would tend to characterize the use shown to have been made of the strip in question and rebut the effect of it as evidence that the strip was actually occupied as part of the street. It would more fully and clearly expose the situation with reference to this question, and yet without introducing the element of title; for its effect would be the same if the city owned the land, since the complaint here is not for trespass upon its land, but for excavating and obstructing its street. Having in fact a title of record, the city should not be allowed, by wilfully ignoring it, to deprive the defendant of the benefit of the evidence of its location and limits as fixed by its own deed. These would throw some light upon the character of the use made by individuals of adjoining open land.

The jury were fully advised by instructions on both sides that title was not involved and its determination should not influence their verdict; that the plats were to be considered only as bearing, in connection with the other evidence, upon

Chaney v. H., F. & F. Missionary Society.

the extent or limit of the city's actual possession for the purposes of a street. This issue has been twice found for the appellee, and we see no such error in the record as would require a reversal of the judgment. It will be affirmed.

Judgment affirmed.

HARRIET CHANEY

v.

THE HOME, FRONTIER AND FOREIGN MISSIONARY SOCIETY OF THE UNITED BRETHREN IN CHRIST.

Wills—Construction—Joinder of Wife—Sec. 2, Chap. 148, R. S.—Evidence—Res Gestæ.

1. A will signed by a husband and wife, the latter signing merely to show her consent to the disposition of property thereby made, is the will of the husband alone.

2. In making the proof required to establish the validity of a will, it is proper to show all that transpired at the time of its execution. The acts and declarations of the parties participating are admissible as of the *res gestæ*.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Coles County; the Hon. JAMES F. HUGHES, Judge, presiding.

Messrs. F. K. DUNN and S. M. LEITCH, for appellant.

Mr. HORACE S. CLARK, for appellee.

WALL, J. The appellee presented to the County Court for probate, as the last will of Samuel Rix, deceased, the following instrument in writing:

“CHARLESTON, ILL., August 14, 1885.

“We give and bequeath to the Home, Frontier and Foreign Missionary Society of the United Brethren in Christ,


organized by the general conference of said church, May 20, 1853, and incorporated in Butler county, Ohio, September 23, 1854, the sum of one thousand dollars (\$1,000), and the receipt of the treasurer of the society shall be a sufficient discharge thereof to my executors and administrators.

“SAMUEL RIX,

“ELIZABETH RIX.”

“Attest:

“SAMUEL MILLS,

“ELIZABETH N. ^{her}  BROWN.”
mark.

Probate was refused by the County Court and an appeal was taken to the Circuit Court, where, at the hearing, it was admitted by the parties (and the admission was taken in lieu of the formal proof) that the said Samuel Mills and Elizabeth Brown would each testify that said Samuel Rix signed the writing in their presence on the 14th day of August, 1885, he then being of full age and of sound mind and memory and under no constraint, and that they attested the writing at his request and in his presence, and in the presence of each other. It was also admitted that the said Samuel Rix and his wife, Elizabeth Rix, whose name is signed under his, were members of the church of the United Brethren in Christ; that they had no children; that Samuel died in August, 1886, leaving as his only heirs, his wife, Elizabeth, and his sister, Harriet Chaney, the appellant, leaving property, real and personal, worth \$4,000, and that said Elizabeth had no property of her own. It was further admitted in lieu of formal proof, that said Elizabeth and the attesting witnesses, Mills and Brown, would testify that she, the said Elizabeth, signed said writing at the time it was signed by the said Samuel at his request, for the purpose of showing her willingness that he should make the bequest, and that she signed it for no other purpose. This evidence was objected to by the appellant, but was admitted by the court, and upon consideration of the facts it was found by the court that the writing produced was the last will and testament of the said Samuel Rix, and the same was admitted to probate accordingly.

The record is brought to this court by the appellant and error is assigned upon the ruling and judgment of the Circuit Court.

By our Statute of Wills, Chap. 148, Sec. 2, it is provided that all wills, testaments and codicils, whereby any property, real or personal, is devised, shall be reduced to writing and signed by the testator or by some person in his presence and by his direction, and attested in the presence of the testator, by two or more witnesses, two or more of whom declaring on oath or affirmation that they were present and saw the testator sign the same in their presence, or that he acknowledged the same to be his act and deed, and that they believed him to be of sound mind and memory at the time of signing or acknowledging; shall be sufficient proof of the execution of the instrument to admit the same to record.

The mere production of the paper with the signature of the testator is not enough. The witness must attest in the presence of the testator, and the will must have been signed by him or acknowledged to be his act and deed in their presence. These proofs are necessary to establish the validity of the will. In making this necessary proof, all that transpired on the occasion may properly be shown as part of the *res gestæ*. This will, of course, include the act and declaration of every person who participated in what was there done, and inevitably, the true relation of every such person will be made known. It will thus be ascertained who was the testator whose act and deed is the paper produced.

In this case it appeared that the deceased, Samuel Rix, executed the will in the presence of the two witnesses, and that they thereupon attested in his presence, and, while the name of his wife Elizabeth was also subscribed, it was not done in execution of the paper, nor did they attest as to her signature. On the contrary, it appears as part of the *res gestæ* that there was no purpose or intention on her part to sign as a testator. We see no difficulty in the admission of the proof, and it being admitted, the conclusion reached by the court was unavoidable.

It thus clearly appeared that the instrument was executed by Samuel Rix and by no one else. There is nothing in this

to contradict or impair the terms of a writing by parol. It is simply this: that in making the necessary proof as to execution of the paper, it is shown by competent evidence that Samuel Rix alone made the will.

It is unnecessary to consider the question discussed by counsel, whether two or more persons may make a joint will, or what would be the effect of such a will, or how it should be proved. 1 Redfield on Wills, 182. Nor is it necessary to support the position by reference to the supposed analogy of cases where it is competent to prove that one of several joint makers of an obligation is a surety merely, or of cases where it is competent to show that one signing in a representative capacity intended to bind, not himself, but the body or corporation represented by him. La Salle Nat. Bank v. Tolu, etc., Co., 14 Ill. App. 141.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

JOHN MEISTER

V.

NICHOLAS LANG.

Real Property—Injury Caused by Water—Gutter—"Ordinary Rain"—Instructions.

1. In an action on the case, brought to recover damages caused by the overflow of water from a gutter on the defendant's buildings, this court declines to interfere with a second verdict for the defendant, the verdict being supported by the evidence and there being no error in the instructions.

2. Ordinary rains are all such, whether heavy or light, as are usual and always to be expected in certain seasons, annually.

[Opinion filed May 25, 1888.]

IN ERROR to the Circuit Court of Logan County; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Meister v. Lang.

Messrs. BEACH & HODNETT, for plaintiff in error.

Messrs. BLINN & HOBLIT, for defendant in error.

CONGER, P. J. This was an action on the case brought by plaintiff in error against defendant in error for damages caused, as it is alleged in the declaration, by defendant in error allowing the gutters upon his building to be out of order, thereby allowing the water to drip near to and against plaintiff in error's brick building and injuring the walls.

Upon the merits of the controversy two juries have found adversely to the claim of plaintiff in error, and we can not say that their finding is not supported by the evidence.

It is insisted that it was error to give the following instruction:

"For defendant the court instructs the jury that the law does not require the owner of a building to keep and maintain a gutter that will always, under all circumstances, carry off the water. If the jury believe from the evidence that the gutter on Lang's building was sufficient to carry off the water that would fall on the roof of Lang's building in the usual and ordinary rainstorms, that would be a compliance with the law."

By ordinary rains are meant all usual and always to be expected rains, in certain seasons in each and every year; and by extraordinary rains, such as do not occur, nor are reasonably to be expected, annually. *McDoy v. Danby*, 20 Pa. St. 85; *Bell v. McClintock*, 9 Watts, 119; *Sprague v. City of Worcester*, 13 Gray, 193; *Ill. Cent. R. R. Co. v. Bethel*, 11 Ill. App. 23.

This instruction is criticised as being misleading because it did not define what an ordinary rain was: and counsel say that *heavy* rains were those spoken of by the witnesses as causing the damage.

All rains, whether heavy or light, that may reasonably be expected to fall at certain seasons, would clearly come within the language and meaning of the instruction. If plaintiff in error desired the jury to have a legal definition of ordi-

nary and extraordinary rains, it was his privilege to ask for it; and because he did not, we see no reason why the court should not use the word ordinary, in the instruction complained of, without stopping to define its meaning.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

HENRY J. HOUSTON ET AL.

V.

CORBEN B. WORKMAN.

Trust Deed—Foreclosure—Statute of Limitations—Sec. 11, Act of 1872—Death of Grantor—Partition and Sale—Privity—Practice—Demurrer.

1. Sec. 11 of the statute of limitations of 1872, prohibiting foreclosure of a mortgage or trust deed, unless within ten years after the cause of action accrues, is construed with reference to Sec. 16 of the same act, which provides for extensions by means of payment or new promise. The right of foreclosure extends until the indebtedness secured is barred.

2. A purchaser of land under a decree of partition and sale, procured by the widow and children of the maker of a trust deed, may avail himself of the defense of the statute of limitations in foreclosure proceedings.

3. Where it appears on the face of the bill that the debt secured is barred by the statute of limitations, advantage may be taken of the bar on demurrer.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Schuyler County; the Hon. WILLIAM MARSH, Judge, presiding.

Mr. JOHN S. WINTER, for appellants.

Messrs. W. L. VANDEVENTER and S. B. MONTGOMERY, for appellee.

CONGER, P. J. This was a bill in chancery filed by appellants against appellee to foreclose a deed of trust. The prin-

cipal facts as shown by the bill are, that on December 10, 1873, one Hartwell Lancaster executed a note for \$316.29, payable twelve months after date, to one Dray, and upon the same day Lancaster and his wife executed to one John C. Bagby as trustee, the trust deed in question upon certain real estate, to secure the note aforesaid. The note was afterward assigned by Dray to said Bagby, and by him to appellant Houston.

The trust deed also passed with such assignment, as security for the note.

That at various times after the maturity of the note, beginning March 10, 1875, and continuing from time to time thereafter until December 28, 1882, said Lancaster made partial payments upon said note. That Lancaster died intestate on June 22, 1884, leaving his wife and five children surviving him as his heirs at law. That at the October term, 1886, in the Circuit Court of Schuyler county, the widow and heirs procured a decree of partition and sale under which, on the 10th day of January, 1887, the said real estate was sold, and appellee Workman became the purchaser, and received a deed therefor.

The bill concludes with a prayer for a foreclosure of such trust deed, unless the amount due upon said note is paid. The bill was filed September 22, 1887.

To this bill a demurrer, both general and special, was interposed, the special cause alleged being that the right of foreclosure was barred by virtue of Sec. 11 of the Limitation Act of 1872, which demurrer was sustained by the court, and a decree entered dismissing the bill.

That appellee as a purchaser was in such privity to the maker of the trust deed that he could avail himself of the defense of the statute of limitations, is clear. Wood on Limitations, p. 79.

He could also properly raise the question by demurrer to the bill, when the facts showing the bar appear on the face of the bill. Ilett v. Collins, 103 Ill. 74.

The decision upon the demurrer involves the construction of Sec. 11 of the Limitation Act of 1872, and as the opinion of the Supreme Court in the case of Schifferstein v. Allison,

reported in the N. E. Reporter of March 9, 1888, page 275, is upon this precise point, it is only necessary to say that according to the doctrine therein announced, the ruling of the Circuit Court was erroneous and the decree of that court will therefore be reversed and the cause remanded.

Reversed and remanded.

W. F. HOYLE

V.

B. F. WARFIELD.

Husband and Wife—Liability for Family Expenses—Sec. 15, Chap. 68 R. S.

Where two persons live together as husband and wife and are recognized and treated as such, the reputed husband is liable for family supplies, although the credit was extended to the reputed wife.

[Opinion filed May 25, 1888.]

IN ERROR to the County Court of Logan County; the Hon. J. T. HOBLIT, Judge, presiding.

Mr. S. L. WALLACE, for plaintiff in error.

Mr. A. D. CADWALLADER, for defendant in error.

CONGER, P. J. Appellee furnished one who passed as the wife of appellant, groceries to be used in appellant's family to the extent of \$22.95. The principal ground of defense relied upon is that, at the time the goods were purchased, there was a special contract between appellee and the supposed wife that they were to be charged to her. Upon this question the evidence is conflicting, but conceding that appellant's theory is the true one, we do not think it relieves him from liability.

The parties were living together as husband and wife and were recognized and treated as such in the community where

28	628
81	242
28	628
84	593

Trustees of Lincoln University v. Hopley.

they lived; and as to all who furnish them the necessaries of life which come under the head of family expenses, under the belief that such relation existed, when such belief is justified by the conduct of the parties, as it clearly was in this case, we think the provisions of Sec. 15 of Chap. 68, R. S., apply.

That section provides that "the expenses of the family * * * shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately."

Under the provisions of this section we think it makes no difference to which of the parties the credit is originally given; they are both liable.

In *Smedly v. Felt*, 41 Iowa, 591, the court say: "Can a party, who does in fact sell an article within the contemplation of these sections, to the husband, upon his individual credit, and receives his note therefor, afterward maintain an action against the wife?" And they answer the question in the affirmative.

We think the judgment below was right and it will be affirmed.

Judgment affirmed.

TRUSTEES OF LINCOLN UNIVERSITY

V.

LAPSLEY C. HEPLEY.

Endowment Fund—Note—Evidence—Character of Educational Institution—Instructions.

1. In an action brought upon an endowment fund note given for the benefit of an educational institution, it is *held*: That the struggling condition of the institution and its failure to take the position expected, constitute no defense; and that the attempt to show a failure of consideration failed.

2. An instruction having no substantial basis in the evidence is improper.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Coles County; the Hon. JAMES F. HUGHES, Judge, presiding.

Messrs. WILEY & NEAL, for appellant.

If the party making the promise gets nothing, or receives no benefit, then he will not be convinced that there can be any consideration. Yet, as a matter of fact and of law, it is perfectly well settled that there may be a good consideration for a promise without any benefit accruing to promisor, and I know of no better illustration of such consideration than the case at bar. Colleges, seminaries and churches all over this land are built and maintained by voluntary contributions, and there is no proposition more firmly established than that where money is expended or liabilities incurred upon the faith of such promise to donate, such expenditure of money or incurring of liability constitutes a good consideration for the promise to give. *Griswold v. Trustees of Peoria University*, 26 Ill. 41; *Pryor et al. v. Cain*, 25 Ill. 292; *Trustees of M. E. Church of Indianapolis v. Garvey*, 53 Ill. 401; *Trustees of Kentucky Baptist Educational Society v. Carter*, 72 Ill. 247.

Messrs. CHARLES BENNETT and J. W. CRAIG, for appellee.

WALL, J. This suit was brought by appellant against the appellee upon the following instrument in writing:

“LINCOLN UNIVERSITY ENDOWMENT FUND NOTE.

“LINCOLN, ILL., October 23, 1874.

“I, L. C. Henley, of the county of Coles and State of Illinois, do bind myself, my heirs, executors and administrators, to pay to the Trustees of Lincoln University at the office of their treasurer in Lincoln, Illinois, the sum of one hundred dollars in ten annual payments of ten dollars, on the first day of October of each year hereafter, three-fifths of which shall become a part of the permanent endowment fund of said

university; two-fifths may be appropriated to such other purposes as the interests of the University may require, with interest on each payment after maturity at the rate of ten per cent. per annum. The payment of this note, or the lifting of the same by a ten per cent. interest-bearing note, will entitle the giver to a one hundred dollar scholarship in said University.

“L. C. HENLEY.” [SEAL.]

A trial by jury in the Circuit Court resulted in a verdict for appellee, and a motion for new trial having been overruled, judgment was rendered against appellant for costs. The record is brought to this court, and errors are assigned upon various rulings of the Circuit Court, in the admission of evidence, the giving and refusing of instructions, and in refusing a new trial. The appellee was permitted to testify that he was induced to sign the instrument by reason of the solicitations of Mr. Crider, a minister, who, representing the institution and urging the importance of a school in the interest of the church, stated that it was the intention to build up one of the best institutions of the country for the education of church people and others who might go there.

He further testified that he was afterward told by the president of the board that, “while it was a very good school, it had not reputation enough to prepare a young man for professional study, or that if he was intending that his son should study for a profession, he would send him elsewhere.”

In rebuttal it was proved by appellant that the instrument sued on, with many others like it, had been accepted by the institution and had been made the basis of various liabilities incurred in conducting the school. The interest on all endowment fund notes was carried on the books as an interest fund and was devoted to the payment of salaries due to the faculty.

There had been failures to collect interest on other notes and corresponding failures to meet the liabilities of the institution.

It is probable that the school was not very successful financially or in point of attendance, and that it was in the struggling condition of many such institutions when dependent upon

a small and uncertain endowment, but there is no doubt that there was an honest effort to carry out the design of its founders and all those interested in its welfare, and to build up a useful agency of education under the auspices of the church to which appellee was attached, and it is apparent that many substantial liabilities were incurred and much important work was done upon the faith of this and similar subscriptions.

In such cases it is the settled rule in this State that the subscription may be enforced. *Trustees Baptist Education Society v. Carter*, 72 Ill. 247, and cases there cited. In this instance there was the additional consideration of a scholarship to which appellee was entitled and there can be no question that the undertaking was binding upon him.

The effort to show a failure of consideration because of the character of the school, was not successful. There was no warranty that any particular standard of excellence or reputation should be reached. It was proposed and intended, no doubt, to attain as much as possible in these respects, but of course this would depend mainly on the support and patronage received, and the prompt payment of promised aid. Without money there could be no rapid development, and so it was highly necessary that all who subscribed should meet their obligations as they matured.

The defense suggested is without merit and there was not sufficient evidence upon which to predicate the following instruction, given at the instance of the appellee:

"The court instructs the jury that, if they believe from the evidence that at the time of the execution of the note in controversy the plaintiff or its agent represented to the defendant, Henley, as a material inducement to sign said note, that the plaintiff had established or would establish or build up a first class institution of learning, and if the jury believe that such representation was the material inducement that caused said Henley to sign said note, and if the jury believe from the evidence that the plaintiff has substantially failed to make good such representation, then the plaintiff can not recover."

For this, and for the refusal to grant a new trial, the judgment will be reversed and the cause remanded.

Reversed and remanded.

Walters v. Walters.

WILLIAM F. WALTERS

V.

ANNA WALTERS.

Fraudulent Conveyances—Collusion—Creditor's Bill—Claim for Personal Services—Judgment by Default—Secret Trust.

1. Upon a creditor's bill to set aside a conveyance made without consideration, as fraudulent, clear proof to impeach the judgment on which the proceeding is based for fraud, is required. Mere suspicion because of the amount of the judgment is insufficient.

2. In the case presented, it being sought to subject the lands conveyed to a judgment obtained three years thereafter, chiefly for personal services covering many years, the conveyance in question having been made without consideration to defeat a claim that was apprehended but never asserted, and in secret trust for the benefit of the grantor, this court declines to interfere with the decree for the complainant, the evidence being insufficient to show collusion, or that the judgment is excessive.

[Opinion filed May 25, 1888.]

IN ERROR to the Circuit Court of Sangamon County; the Hon. J. A. CREIGHTON, Judge, presiding.

Messrs. JOHN M. and JOHN MAYO PALMER, for plaintiff in error.

The conveyance made by Pollard Keen Walters to the defendant below is valid as between the parties, whether supported by a consideration or not. The complainant below attacks it in her alleged character of creditor. In order to her success, it must appear from the evidence that she is a creditor of the grantor under whom the defendant claims, and was so at the time of the execution of the deed.

A fraudulent deed is conclusive as to the grantor and his heirs. *Horner v. Zimmerman*, 45 Ill. 14; *Lyon v. Robbins*, 46 Ill. 276.

To impeach a voluntary conveyance successfully, it lies upon the complainant to aver and prove that he was a creditor at the time the conveyance was made. *Moritz v. Hoffman*, 35 Ill. 553; *Merrell v. Johnson*, 96 Ill. 231.

We have said that the complainant below attacks the deed in her alleged character as creditor; but it will be seen, upon examination, that the bill contains no averment of the date of the account, or of the nature or amount of her alleged demands against Pollard K. Walters. The only averment of the bill which refers to the existence of the claim is, "that on the 16th day of May, 1882, after the greater amount of the indebtedness upon which the judgment was rendered had accrued, the said Pollard K. Walters made a pretended conveyance," etc.

The averment quoted, whatever other meaning it may have, contains a distinct admission that some part of the indebtedness for which the judgment was rendered, accrued after the date of the conveyance under which defendant claims.

Referring to the rule which makes it necessary, in order to impeach a voluntary conveyance, to aver and prove that the complainant was a creditor at the time the conveyance was made, it seems to us that the averments of this bill are not only insufficient, but the one found in the bill makes it absolutely impossible that the decree of the court below should be sustained. If the bill precisely averred an amount to be due at the date of the defendant's deed, the deed could only be held void as to the amount due.

A deed, even if made to defraud, hinder or delay creditors, is, in the contemplation of the statute, void as to creditors who were such at the time of the execution of the deed, but not as to subsequent creditors. *Ward v. Enders*, 29 Ill. 519. And the authorities are numerous in support of the rule, that a creditor who blends in one suit debts accruing before and after a conveyance alleged to be fraudulent, and who recovers a judgment for the whole demand, will be regarded as a subsequent creditor. *Usher v. Hazeltine*, 5 Me. 471; 17 Am. Dec. 254; *Miller v. Miller*, 23 Me. 22; 39 Am. Dec. 597 and note; *Reed v. Woodman*, 4 Me. 100; *Moritz v. Hoffman*, 35 Ill. 553.

MESSRS. PATTON & HAMILTON, for defendant in error.

"In cases where fraud is established, the creditor does not claim through the debtor, but adversely to him, and by a para-

mount title which overreaches and annuls the fraudulent conveyance or judgment by which the debtor himself would be estopped." Waite's Fraudulent Conveyances, Sec. 74.

When the conveyance is to hinder and defraud creditors, it is void as against existing and subsequent creditors. *Getzler v. Saroni*, 18 Ill. 511; *Morrill v. Kilner*, 113 Ill. 318.

When a conveyance is merely colorable and a secret trust and confidence exist for the benefit of the grantor, it is void as against both pre-existing and subsequent creditors. *Jones v. King*, 86 Ill. 225; *Annis v. Bonar*, 86 Ill. 128; *Moore v. Woods*, 100 Ill. 451; *Gordon v. Reynolds*, 114 Ill. 118; *Lawson v. Funk*, 108 Ill. 502; *Bump's Fraudulent Conveyances*, Sec. 319; *Mitchell v. Sawyer*, 115 Ill. 650.

The grantee of a voluntary or fraudulent conveyance may show the judgment was fraudulently obtained, or that the debt has been paid, but the right to impeach the judgment does not extend so far as to give him the right to re-try an issue which has been litigated and determined between the parties in accordance with the forms and principles of law. *Bump's Fraudulent Conveyances*, 540; *Sidensparker v. Sidensparker*, 52 Me. 481; *Ferguson v. Kummier*, 11 Minn. 104.

He can not defend on the ground that the debtor might have interposed a good defense against the judgment had he chosen to assert it. *Dewey v. Moyer*, 9 Hun, 479.

"A court of equity can not and ought not to take upon itself to enter anew into the merits of the case. It is bound to presume that all things have been rightfully done." *Story's Eq. Pl.*, Sec. 782.

PLEASANTS, J. This was a creditor's bill filed by Anna Walters July 18, 1885, to set aside a deed of May 10, 1882, from Pollard K. Walters to his brother, the plaintiff in error, and subject the lands therein described to her judgment against the grantor, of June 18, 1885, for \$10,000.

Pollard was defaulted, and on the pleadings and proofs as to William F., a decree was entered setting aside said deed. Though prior to her judgment, she charged that it was executed "after the greater part of the indebtedness on which

it was rendered had accrued," which is deemed a sufficient averment that she was at the time a creditor of the grantor. The bill went further, however, and charged that it was "not real, but a sham, made with the intention of defrauding" complainant and his other creditors; and in *Jones v. King*, 86 Ill. 229, the court said: "We understand the rule to be settled that where the conveyance is colorable merely, and a secret trust and confidence exists for the benefit of the grantor, the conveyance will be held void both as against precedent and subsequent creditors." In *Gordon v. Reynolds*, 114 Ill. 127, also expressly distinguishing such a conveyance from those held to be fraudulent only against existing creditors, the language above quoted is repeated and approved. The descriptions in the bill and in the opinion cited are substantially equivalent.

It sufficiently appears that this deed was made without valuable consideration, to defeat claims that were apprehended but never asserted, and in secret trust for the benefit of the grantor, and that he had not then and has not now any other property subject to execution.

But it is said Mrs. Walters can not complain, because her judgment is no less tainted; that it was obtained upon a purely fictitious claim, by collusion and for a fraudulent purpose; and furthermore that the deed was made upon her advice or with her consent.

It was a judgment by default, and the damages were assessed by the court upon the testimony of five or six witnesses, who testified in this case also, and to the following effect:

Twenty-one or two years before she came, a stranger, from Missouri, to the house of Pollard K. Walters, a bachelor, with whom were living his mother, an invalid sister and a younger brother, and entered upon what has been the work of her life ever since, (save the time of a few visits to her daughter in Nebraska, the longest of which was five or six months,) and which is supposed to be the foundation and principal part of her claim.

It consisted of both management and manual labor, in every department within the house, and not a little without. Ex-

cepting the first few years, she was almost entirely unassisted. Pollard, having lost a leg, growing old and in impaired health, could do but little; his mother, who died about 1871 at an advanced age, was long disabled; the sister, still living on the place with him and the defendant in error, was a fleshy, heavy woman, hard of hearing, almost totally blind, and without the use of her lower limbs. The farm comprised about two hundred and thirty acres, of which nearly one hundred and sixty were under cultivation. With these conditions the cares and labors of this unaided woman may be more easily imagined than described. Her duties as nurse alone, were such as few would undertake, except from necessity or natural affection. Many witnesses testified to her performance of them, some of whom were adverse in interest and unfriendly in feeling, yet not one made a question as to her faithfulness, efficiency or kindness. She served, besides, as housekeeper, manager, and woman of all work, including much that was properly a man's only, and her ability in all these lines appears to have been remarkable. For all this service she had received but little, if anything, more than her living. The small sums of money she got from time to time may well have been for her use as manager, and expended for the family. Pollard says he had paid her nothing on account of her services. There was no express contract nor ever any settlement between them. But these facts are explained, in part at least, by their evident illiteracy and the expectation that she would be paid out of the land. Coming to him a stranger, as she did, she sustained no such relation as would warrant the presumption that her services were rendered gratuitously or as a member of the family. She did not become a member until about five years ago, when she was married to David, the younger brother referred to, a few weeks before his death.

She had, then, an honest claim, on which she might have had a righteous judgment and been well entitled to protection against this fraudulent conveyance.

But for how much? It appears to have been ascertained by a judgment regularly obtained. Did she and those who were authorized to represent her, present it in good faith as to the amount?

If it was wholly or mainly for wages, it must be conceded that the sum recovered, \$10,000, was extraordinarily large, even for twenty years of service, all unpaid; and if it depended upon the evidence produced in this case, exclusive of the judgment, it would be difficult, in the light of our common knowledge, to sustain it. What we all know of wages paid to hired women, even for services of the character here indicated, would discredit to some extent, in respect to their honesty or their intelligence, any opinions of the reasonable market value of hers that would make up that sum. The only direct evidence of their value came from the side of the plaintiff in error. Two or three of his witnesses estimated it at from one to two dollars per week. They were not entirely disinterested and unprejudiced, and from all the evidence and our common knowledge, we should think this unreasonably low.

On the part of the defendant in error it was testified, somewhat incidentally, that seven or eight years ago she loaned to Pollard Walters about \$700, which she had received from David before their marriage, and Pollard himself said, generally, that he had borrowed money from her at different times, and that he justly owed her more than the amount of the judgment. But she did not attempt to re-try her claim or show the justice of the finding. She relied on the judgment itself, as sufficient of its own force. The record introduced showed a summons, proper and timely service thereof, default taken, assessment by the court on hearing evidence and final judgment for the amount assessed—all in the usual form; but not the declaration, nor the account filed with it, if any there was.

This was conclusive against Pollard and *prima facie* sufficient as against the plaintiff in error to establish the existence and amount of her debt. Nor would the mere fact, if shown, that it was erroneous as to the amount or otherwise unjust to Pollard, avail the plaintiff in error, for the reason that such fact, of itself alone, would not affect the presumption of good faith on the part of defendant in error in obtaining it. Through errors of counsel, courts and juries, such judgments are constantly being obtained. He is not authorized to re-try

the claim or investigate the judgment for the purpose of correcting error and injustice against Pollard. He presented no such issue, nor could he have well presented it, by his pleading. He has no equity in the land. He paid nothing for it. His deed, though valid as against Pollard, is void even as to his subsequent creditors. Against such he can not contend. He is permitted to contend against this apparent creditor because he alleges that she is not a real creditor; that the judgment which gives her the appearance of a real creditor was collusive and fraudulent, and so no judgment at all. He must therefore show it was so erroneous, so unjust, or so obtained as to overcome the presumption of good faith in obtaining it.

The question, then, is whether there is evidence in the case of an amount and character sufficient to overcome such presumption arising from the judgment itself and the circumstances of its rendition, and it is a question not free from difficulty. This arises almost entirely from the magnitude of the amount. If it had been two or three thousand dollars, we should have little or no hesitation about it; but we can not entirely rid our minds of suspicion that some fictitious claim, some guess by witnesses as to the amount, or some fraudulent or careless admission by the defendant therein, was used to arrive at the large amount found. And yet it is hardly more than suspicion and based as much on ignorance and assumption as on knowledge of real facts. What is known is, that though a judgment by default, it was not by confession; that the assessment was made not upon mere computation, nor upon the testimony of either party, but of a number of witnesses who seem to have had no interest in the question, and that the amount assessed was precisely that laid in the *ad damnum* in the writ.

What is unknown is, what were the items of plaintiff's claim and what was the testimony of the witnesses on the assessment. It was for the plaintiff in error to make these appear if they would tend to show fraud. Can he insist, on any rule of law or reason or logic, that the amount of the judgment shall be considered as a circumstance bearing on the question of its fairness, in the absence of all proof as to the

evidence on which it was obtained? Can he ask this court to hold, abstractly, that Mrs. Walters could not have a just claim to that amount against Pollard K. Walters? Can it be assumed or inferred from anything in this record that her claim was limited to wages for her services and \$700 of money loaned? Can the opinion of witnesses in this case as to the value of her services impeach the credibility of testimony that is unknown? Can we assume that this testimony included an admission by Pollard as to the amount he owed, and further, that such admission was fraudulently made to be proved, in lieu of other evidence which could not be produced of the reality and amount of her claim? And what effect shall be given to the presumption of intelligence and integrity to which the judge who heard the evidence and rendered the judgment is entitled?

On the hearing of this cause the complainant swore that she brought that suit in good faith to secure what Pollard Walters owed her, and he, that he made no defense because he had none, and that he justly owed her all she recovered. Neither was cross-examined. There is no other creditor of Pollard to be affected by this judgment; and we think, notwithstanding suspicion, that clearer proof to impeach it for fraud should be required of the plaintiff in error, than he has here produced.

It is not shown by a preponderance of evidence that the deed to him was made upon the advice or with the consent or knowledge of Mrs. Walters.

The decree of the Circuit Court will be affirmed.

Decree affirmed.

NATHAN YELTON

V.

J. H. HANDLEY.

Divorce — Alimony — Lien upon Personal Property — Replevin — Secs. 44, 45, Chap. 22, R. S.

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28	640
111	1279

Yelton v. Handley.

1. A court of equity has no power to make a decree for alimony a lien on personal property.

2. An execution under a decree for alimony can not be levied upon personal property which has been previously sold to a third person.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Edgar County; the Hon. C. B. SMITH, Judge, presiding.

Mr. HENRY S. TANNER, for appellant.

There was no lien against the personal property of John W. Lewis until the execution was placed in the sheriff's hands; plaintiff therefore bought the horse in controversy free from any lien under the decree. A decree for the payment of money only, where no other act is required to be done, can not be made a lien on personal property. Sections 44 and 45, Chap. 22, Revised Statutes; Eames v. Germania Turn Verein, 74 Ill. 54; Karnes v. Harper, 48 Ill. 527.

Mr. DANIEL B. DECHERT, for appellee.

PLEASANTS, J. On the 28th or 29th of June, 1887, appellant bargained for a horse of John W. Lewis, for \$130, and on the following day took possession, without notice of any adverse claim to or lien upon it. On the 2d of July appellee, who was sheriff of the county, received an execution, issued on the same day, against said Lewis, which he levied on said horse. Thereupon appellant brought this suit in replevin to recover it, in which he failed below.

It appears that the only warrant for this writ of execution was a decree of divorce against Lewis at the March term, 1887, of the Edgar Circuit Court, awarding to the complainant therein, for alimony, the sum of \$400 per annum, to be paid in equal quarterly installments on the first day of April, July, October and January, respectively, declaring it a lien therefor on the real and personal property of the defendant, and authorizing execution in default of such payment, as upon a

judgment at law. It was for the second installment that the writ in question, under which appellee claimed, was issued.

The only question for our determination is whether this decree was a valid lien upon the horse in controversy. Since the statute neither itself declares nor authorizes the courts of equity to declare the lien of decrees in all possible cases, we think the lien, or the power of the court to declare it, must in every case depend upon the statute, and neither is to be ascertained or limited by reference to the general powers or practice of courts of chancery, independent of the statute. Every decree against any party must respect real estate, or require such party to pay money, or to perform some other act, or to refrain from performing some act, one or more or all of these, and the Legislature has made express provision as to the lien of each class.

Section 44 of the chancery act, Chap. 22. R. S., of itself makes every "decree for money" a lien on the "lands and tenements of the party against whom it is entered, to the same extent and under the same limitations as a judgment at law."

Section 45 provides that all decrees shall be a lien on all "real estate" respecting which they shall be made; and that "whenever, by any decree, any party to a suit in equity shall be required to perform any act other than the payment of money, or to refrain from performing any act, the court may, in such decree, order that the same shall be a lien upon the real or personal estate, or both, of such party, until such decree shall be fully complied with."

The decree here in question is for the payment of money only, and is therein ordered to be a lien for no other purpose than to secure and enforce such payment. It does not require the defendant to perform any other act or to refrain from performing any act. Thus it is of the class which the statute itself expressly makes a lien on "lands and tenements," not including "personal estate," and is not of either class of which, and no other, the statute also expressly declares "the court may order" that it shall be a lien upon "personal estate."

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A proper construction of these provisions, it seems to us, requires the application of the rule that *expressio unius exclusio alterius est*.

We therefore hold that power to so order, in such a decree, is absolutely withheld from the court. It follows that the attempt to exercise it is something more than mere error, or mistaken action within the scope of rightful power. That portion of this decree was inoperative. The execution came to the hands of the sheriff and was issued after the title to the horse and its possession had passed to appellant. It never was a lien of itself, and it derived no force from the decree.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

THOMAS WALKER

V.

J. F. McDONALD.

Landlord and Tenant—Parol Lease—Contract of Purchase—Distress—Attornment.

1. Payment of rent is a sufficient attornment.
2. In a proceeding by distress for rent alleged to be due under a parol lease, this court declines to interfere with the judgment for the plaintiff, the evidence being conflicting.

[Opinion filed May 25, 1888.]

APPEAL from the County Court of Moultrie County; the Hon. H. A. MINER, Judge, presiding.

Messrs. W. G. COCHRAN and MEEKER & JENNINGS, for appellant.

Messrs. EDEN & TITUS, for appellee.

PLEASANTS, J. Appellant was tenant of Elder under a parol lease, renewed from year to year, and commencing on the first of March, for grain rent. After he had so occupied for several years, in April, 1886, appellee contracted with the lessor to purchase the premises; and the deed therefor was made in June and left in a bank for the grantee, who, on August 9th, got it and put it on record. Afterward he issued the distress warrant herein, which was amended by leave of court to charge that appellant was about to sell and remove, without his consent, so much of the grain raised on the place that it would endanger his lien for rent. The proceedings thereon resulted in a judgment on verdict for appellee for \$161.80.

Appellant insists that he never attorned to appellee. Whether Sec. 14 of Chap. 80 of the Revised Statutes does or does not dispense with the necessity of attornment in such a case—which we do not now decide—there is evidence in the record that after notice of the conveyance by Elder, he paid a portion of the rent, being the proceeds of the rent oats, to appellee, and on divers other occasions recognized his relation as landlord; and this is sufficient. *Flagg v. Geltmacher*, 98 Ill. 293; *Hayes v. Lawver*, 83 Ill. 182; *Fisher v. Deering*, 60 Ill. 114.

He further claimed that nothing would be due to appellee for that year because of a claim he had against Elder for improvements made, amounting to more than the year's rent, which Elder, before the conveyance to appellee, agreed should be retained out of the rent. His own testimony falls short of proof to that effect. He says he was owing Elder for a wagon and for borrowed money and proposed to settle, but Elder said he hadn't time to look at the improvements and would settle for them at some future time, and that for whatever improvements appellant had put or might put on the place, he should take his pay out of the rents the coming year if he, Elder, did not pay him. He gave his note for the wagon and borrowed money and there was never any settlement between them for the improvements. His claim is also somewhat discredited by his first offering to Elder the proceeds of the rent

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oats, which he afterward, on being advised of the conveyance, paid to appellee. Furthermore, Elder denied the alleged agreement, and it was for the jury to determine which should be believed.

He contends, lastly, the proof failed to sustain the charge in the distress warrant; that it showed there was in the place at the time of levy twelve hundred bushels of corn, being the full amount of the landlord's share, and that the proceeds of the rent oats had been paid to him. He admits, however, that he claimed the right to dispose of that corn to satisfy his claim against Elder, and threatened to exercise it, Elder having in the meantime failed in business. On all these points there was conflicting evidence, but we think the finding was warranted.

The instructions, which were numerous, are not abstracted, nor is any question made upon them. The judgment will be affirmed.

Judgment affirmed.

J. T. N. WALTON AND ADALINE WALTON

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Criminal Law—Scire Facias—Forfeited Recognizance—Surrender—Statute—Evidence.

1. In a proceeding by *scire facias* on a forfeited recognizance, evidence to show that, before the forfeiture, the principal had surrendered himself to the sheriff, is admissible.

2. Where the surrender is voluntary and by the principal, a certified copy of the recognizance is unnecessary, particularly where the sheriff, acting upon his own acquaintance with the party and his own knowledge of the circumstances, accepts the surrender.

[Opinion filed May 25, 1888.]

IN ERROR to the Circuit Court of Coles County, the Hon. C. B. SMITH, Judge, presiding.

MR. CHARLES BENNETT, for plaintiff in error.

MR. S. M. LEITCH, for defendant in error.

WALL, J. This was a proceeding by *scire facias* on a forfeited recognizance. There was judgment for the people. Various errors are assigned, but the only point we deem it necessary to consider arises upon the refusal of the court to admit certain evidence offered by the appellant. That offer was to prove that before the forfeiture of the recognizance the principal had surrendered himself to the sheriff of the proper county, and that the fact was made known to the sureties. The offer was rejected, and the ruling of the court is now defended upon the ground that a surrender can not be made efficient until the sheriff shall be furnished with a certified copy of the recognizance, and that to discharge the sureties the sheriff must in writing acknowledge the surrender.

The provisions of the statute relating to the subject will be found in Div. 3, Chap. 38, R. S., as follows:

"Section 11. In all cases of bail for the appearance of any person charged with a criminal offense his sureties, or any of them, may at any time before default upon the bond or recognizance surrender the principal in their exoneration, or the principal may surrender himself to the proper officer.

"Section 12. For the purpose of surrendering the principal, the sureties, or any of them, may arrest the principal at any place, or may authorize any other person to make the arrest.

"Section 13. These sureties, or any of them, may require the sheriff, coroner or any constable of the county where the principal may be found, to make the arrest within his county, by producing a certified copy of the recognizance, and in person or by agent accompanying the officer to receive the person arrested, and upon tender to such officer of like fees as are allowed for executing *capias* in criminal cases.

"Section 14. The surrender shall be made to the sheriff of the county where the principal is required to appear, or to the warden of the penitentiary, when so required.

“Section 15. On such surrender, and the delivery to him of a certified copy of the recognizance, the sheriff or warden shall take such person into custody, and, by writing, acknowledge such surrender, and thereupon the sureties shall be discharged from such recognizance, upon payment of all costs occasioned by any proceedings upon the recognizance.”

It is not disputed that the sheriff was the “proper officer” to whom the surrender should be made, but it is contended that whether the surrender is voluntary, by the principal, or involuntary, and at the instance of the sureties, the mode prescribed by Secs. 13 and 15 must be followed. We are inclined to hold that when the surrender is voluntary, by the principal, there is no necessity for the certified copy of the recognizance. True, the sheriff may not know the person offering to surrender himself, or he may not know that such person has ever entered into the recognizance and may therefore decline to accept the custody so offered until the necessary facts are known; but we have no doubt that a surrender would be perfectly good in such a case if the sheriff, acting upon his own acquaintance with the party and his own knowledge of the circumstances, should accept the surrender and take the person into his custody.

To hold otherwise would be to deprive sureties of a valuable right in cases where the principal is willing to surrender himself, but by reason of absence or other causes the sureties are not able, at the time, to furnish the certified copy or to receive the written acknowledgment of the officer.

Section 11 contains no limitation or conditions. It declares merely that sureties may surrender the principal, or he may surrender himself.

The subsequent sections, 12, 13 and 15, are applicable where the sureties are moving for their own protection, and presumably against the will of the principal, in which case the officer should be secured against mistake by some proper and fit means; but they are not appropriate in the other case where the principal proposes to surrender himself. The judgment will be reversed and the cause remanded.

Reversed and remanded.

ANN BEERS
v.
LEONARD MYERS, ADMINISTRATOR.

Administration—Guardian's Estate—Claim—Statute of Limitations—Trusts—Classification of Claims—Practice—Error without Prejudice.

1. A trust, to be exempt from the operation of the statute of limitations, must be direct and exclusively within the jurisdiction of equity, and the question touching it must arise between the trustee and the *cestui que trust*.

2. A claim presented against the estate of a deceased guardian thirteen years after the claimant became of age, to charge the estate for funds, most of which were received by the deceased before his appointment as guardian, is barred by the statute of limitations.

3. In the case presented, the trust, if any, was neither direct nor within the exclusive jurisdiction of equity.

4. An objection to the classification of a claim allowed against an estate can not be first raised in this court.

5. An error without prejudice to the appellant, is not sufficient ground for reversal.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of Vermilion County; the Hon. C. B. SMITH, Judge, presiding.

Mr. W. R. LAWRENCE, for appellant.

It is a well settled rule that the statute of limitations does not apply in case of an express continuing trust, until there has been some open, express denial by the trustee of the right of the *cestui que trust*. Hill on Trustees (2d Am. Ed.), 372, note 2 and authorities cited; Wood on Limitation of Actions, 414; Albrecht v. Wolf, 58 Ill. 189; Bond v. Lockwood, 33 Ill. 218.

A guardian appointed upon his own application by a court, becomes, under the language of the statute and by the principles of the common law, the trustee of an express trust. His powers and duties are specifically defined by the statute. And

Beers v. Myers.

while his control of the person of the ward ceases at majority and his right of possession of his ward's property also ceases, yet he can not benefit by his neglect and failure to settle with his ward at this time and be released from his trust by the court appointing him. The trust continues until such release, Schouler on Domestic Relations, Sec. 321; Bond v. Lockwood 33 Ill. 218; Rev. Statutes, 1874, Chap. 64, Sec. 15; Davis v. Harkness, 1 Giln. 180; Farman v. Brooks, 9 Pick. 212; In re Steele, 65 Ill. 322.

Should it be urged that the relation of trustee and *cestui que trust* ceased when the ward became of age, yet in a case very much like this, Scheel v. Eidman, 77 Ill. 301, where the wards, after majority, filed a claim against the estate of their deceased guardian for money received by him as guardian, and the statute of limitations was interposed by the administrator, the court held that the statute of limitations did not run so long as a suit could be maintained on the bond of the guardian. In this case the cause of action could not be said to have accrued, in any view of it, until the majority of the ward, which was October 28, 1873. Her guardian died February 9, 1886, and she filed the claim February 5, 1887. But it is said by the Supreme Court in Gilbert v. Guptil, 34 Ill. 139, that the relation of guardian and ward subsists until he has fully accounted and paid over the balance against him. This is a very just view, otherwise the guardian could acquire the right to his ward's property by means of his own neglect of duty.

It may be said that if the rule we contend for be true, then we are limited to a recovery of the amount of the bond. And this is evidently the view taken by the court below, when it gave judgment for \$56. In the case of Scheel v. Eidman, above cited, the amount of the bond is not shown, yet the ward's estate was shown to have been at date of appointment, \$624, and it is presumed the bond was double this sum—\$1,248—while the amount of the judgment affirmed was \$1,522. Had appellant's claim been based upon the bond, then it is clear her recovery would have been limited to the amount of the penalty of the bond. It would have been purely a legal

action in its character, in such case, and the question of limitation could not have arisen. This remedy would have been entirely inadequate; hence the necessity to resort to equitable relief, being in the nature of a bill for an accounting, by filing a claim against the estate. And it does not lie in the mouth of the guardian's administrator to say our remedy is upon a bond given by him in the inadequate sum of one-tenth of the estate of his wards, actually in his hands at the time he gave it, which he wrongfully withheld from the knowledge of the court that appointed him. As held by the Supreme Court in *Davis v. Harkness*, 1 Gilm. 180, one is held to account as guardian, although he did not receive the estate as the regularly appointed guardian. And this guardian in the recitals of his bond and in his oath of office, assumed to faithfully preserve the property of his ward then in his possession, and that might thereafter be received by him, and his administrator is now estopped from assuming a different position.

But we insist that the guardian's bond, or amount of it, cuts no figure in this case, except so far as it was one of the incidents in the creation of the character of the trust. The trust assumed by the guardian was express and direct, and one belonging exclusively to the jurisdiction of a court of equity; and in this case the question arises between the trustee's representative and the *cestui que trust*, thus being within the rule approved in *Hayward v. Greene*, 82 Ill. 289.

An action upon the bond, in this case, would be utterly inadequate, as already shown. And an action at law for money had and received could not be maintained because the trust is still open. In order for this action to lie there must have been a settlement of the account and balance struck. *Perry on Trusts*, Sec. 843; *Hill on Trustees* (2d Am. Ed.), 758.

We admit that under one view of the case the deposit of the money of the wards in a bank, at or about the time of their majority, may be a circumstance in favor of the good faith of the guardian at this time; yet it appears to have been deposited in his own name, and that he invested it in a certificate of bank stock in his own name. No investment of the

money was made under the approval of the court as the statute provided, hence he undertook the management of the estate at his peril. *McIntyre v. People*, 103 Ill. 146; *Hughes v. People*, 111 Ill. 460; *Winslow v. People*, 117 Ill. 158.

Mr. J. B. MANN, for appellee.

WALL, J. The appellant presented a claim against the estate of Joseph L. Shepherd, deceased, for the sum of \$2,371.80, alleged to have been received by deceased as the guardian of the appellant. The County Court allowed the sum of \$1,555 as a seventh-class claim, from which allowance the administrator prosecuted an appeal to the Circuit Court, where an allowance was made for the sum of \$56, from which an appeal is prosecuted to this court.

On the 24th of June, 1862, the deceased was, on his petition, appointed guardian of his three infant daughters, appellant being one of them.

In said petition he stated that the three infants were entitled to property from the estate of Joseph Davis, deceased, estimated at \$56, due them as heirs of their mother, then deceased, who was one of the heirs of the said Joseph Davis. He was accordingly appointed and was required to give bond and surety in the sum of \$112, which was done. It does not appear that he ever made a report of his acts as guardian nor that any further order was ever made in respect to the matter by the court which so appointed him. The evidence tends to prove that the deceased, Joseph L. Shepherd, received a considerable sum of money from the proceeds of land inherited by his wife, the mother of these girls, from her father, Joseph Davis. This money was received by him at different times between the death of his wife, which occurred in 1857, and the year 1860, the last receipt being two years or more before he was appointed guardian.

The whole sum thus received was something near \$1,000. Whether he then regarded this money as belonging to his children or whether he considered it his in whole or in part does not very clearly appear, but when he applied for letters

of guardianship he did not seem to think it was his. There is evidence, however, which tends to prove that at a later period he deposited in the bank of John C. Short & Co., of Danville, a sum of money which at the time of the failure of the bank, in 1873, amounted to about \$2,600. This money, before and after the failure, he spoke of and referred to as "the girls' money."

On one occasion, soon after the failure, he was requested by one of the girls, Elizabeth, to settle, when he said that he had lost the money belonging to her and appellant (the other sister having died without issue) in Short's Bank; that he was working hard to accumulate the amount, and when he did, he would put it in land and fix it so the girls could have the benefit of it when they were old; that they were young and able to work but when they got old they would need it. He seemed to be angry about it and Elizabeth never spoke to him on the subject afterward. The two girls were then of age. There is also some evidence, though quite unsatisfactory, as to a recognition of the same state of facts as late as 1884, some two years before his death, but the statement made by the witness is rather indefinite and leaves the impression that there is great doubt as to what was actually said—so much so that the Circuit Court evidently gave it but little weight and it is not much pressed by counsel. It appears that the deceased had married his second wife before he was appointed guardian; that by this wife he had seven children; that the appellant and her sister Elizabeth lived with him until they married, and that, when he died, in 1886; he left an estate consisting of some four hundred acres of land, the value not given, besides personal property valued at \$15,000; that he was prompt in the payment of his debts and that but very few claims had been presented against his estate.

From these facts thus briefly stated it is probable he did not consider himself under any legal obligation to account for the money lost in the bank, either because he supposed he was not bound to bear the loss and make it good, or because he did not regard the money as really belonging to the girls, though no doubt intending that they should have it. It is reasonably

certain that the girls knew what were his views as to this, and that the delay of nearly thirteen years after the younger one, the appellant, came of age, to press their claims, was not due to any want of information as to the facts. The question presented is, whether the claim is barred by the statute of limitations. The Circuit Court held that it was, except as to the amount that might be recovered upon the bond, and accordingly allowed appellant \$56, being one-half of the penalty of the bond. The appellee, while not admitting the propriety of this allowance, assigns no cross-error in respect thereto, and we are therefore to consider only whether the statute of limitations was properly applied to the residue of appellant's demand.

It is insisted on behalf of appellant that this is an express or direct trust and not barred by the statute of limitations. To exempt a trust from the bar of the statute, it must be, first, a direct trust; second, it must be of the kind belonging exclusively to the jurisdiction of a court of equity; and third, the question must arise between the trustee and the *cestui que trust*. Angell on Limitations, Sec. 166; Hayward v. Gunn, 82 Ill. 385.

Angell also says, Sec. 174, that where the trustee denies the right of the *cestui que trust*, he abandons his fiduciary capacity, and the statute will apply. School Directors v. School Directors, 16 Ill. App. 654.

It is not easy to determine what is the character of the trust, if there was any in this case. The money came to the hands of the deceased before he assumed the duties of a guardian, and whether he had the right to claim it as his own, in law, or whether he felt bound to preserve it for his children, he did not seem to consider it any part of the estate which he was to handle as guardian. If, then, the character of a trust is to be impressed upon it at all, it would seem to arise by operation of law, and it would therefore belong to the class of implied trusts, and in that view the statute of limitations will be applicable. But if, as appellant argues, it is a direct trust because of the subsequent appointment as guardian, then we must hold that it is not of

that class of trusts which belong exclusively to the jurisdiction of a court of equity.

There is no reason why the appellant might not have urged her claim in a court of law during the lifetime of her father with as much propriety as to present it for allowance against his estate after his decease. It must therefore be subject to the statute.

Again, there seems but little doubt that soon after the failure of the bank, he denied his liability in a legal sense, though admitting and avowing a purpose to make a provision, in his own way and in his own time, for the benefit of the girls. In this they seem to have acquiesced, and probably because they were conscious that they had no legal claim upon him.

We are impressed with the belief that in this case, as in most cases, the statute of limitations, if successfully interposed as a bar, will work no injustice. Had the claimant pressed her demand while her father was yet alive, it is to be presumed, from what is even now disclosed, that he could have shown he was not liable. He was solvent, prompt in the payment of his debts, and no reason is apparent for withholding a valid claim until after his death.

It is urged the Circuit Court erred in not classifying the allowance made as of the sixth class.

It does not appear that the court was asked to do this, and no such ground is set out in the motion for a new trial. It should not be presented here for the first time. *O. & C. R. R. Co. v. McMath*, 91 Ill. 104.

We consider it not important, however. The estate is large and the claims against it are inconsiderable in amount, so that it is not material in what class the allowance is placed. Hence, if the omission were error, it should not work a reversal. The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

C. & A. R. R. Co. v. Kelly.

CHICAGO & ALTON R. R. Co.

V.

CATHARINE KELLY, ADMINISTRATRIX.

28	655
54	390
28	655
118	442

Railroads—Personal Injuries—Fellow-Servants—Contributory Negligence—Damages—Instructions.

1. The question of contributory negligence upon the part of an employe of a railroad company, injured in the course of his employment, should be left to the jury.

2. A railroad section hand is not a fellow-servant of men in charge of a construction train, unless they are together co-operating in furthering a particular business of the common master.

3. In the case presented, the co-operation of the section hands and the crew of the construction train in placing ballast upon the road-bed ceased when they returned to their former and separate duties.

4. It is proper to refuse instructions which tend to mislead, or seek improperly to take a question from the jury.

5. It was not the duty of the court to give the jury an instruction as to what facts would constitute the employes of the defendant fellow-servants, there being no request of that nature.

6. In the absence of evidence of passion or prejudice on the part of the jury in the case presented, this court declines to interfere with the verdict for the plaintiff for \$2,500 as excessive.

[Opinion filed May 25, 1888.]

APPEAL from the Circuit Court of McLean County; the Hon. C. B. SMITH, Judge, presiding.

MESSRS. FIFER & PHILLIPS and WILLIAMS & CAPEN, for the appellant.

No recovery can legally be had in this case for the reason that Patrick Kelly was the fellow-servant of the men who operated the train by which he was struck. *Abend v. T. H. & I. R. R. Co.*, 111 Ill. 202; *C. & E. I. R. R. Co v. Geary*, 110 Ill. 383; *Voltez v. O. & M. Ry. Co.*, 85 Ill. 500; *C. & A. R. R. Co. v. Murphy*, 53 Ill. 336; *T. W. & W. Ry. Co. v. Durkin*, 76 Ill. 395; *St. L. & S. W. Ry. Co. v. Britz*, 72 Ill.

256; C. & A. R. R. Co. v. Keefe, 47 Ill. 108; I. C. R. R. Co. v. Cox, 21 Ill. 20; C. & N. W. R. R. Co. v. Morand, 93 Ill. 302; C. & A. R. R. Co. v. Hoyt, 16 Ill. App. 237; C. & A. R. R. Co. v. O'Bryan, 15 Ill. App. 134.

There was no conflicting testimony as to what relation Kelly bore, in the service, to the men whose conduct is in question. The degree of association of Kelly with them, the nature of their respective employments, what they had all been doing on that day and what they were doing respectively at the particular time Kelly was hurt—all these things appear from the perfectly harmonious account of the different witnesses. The men being employed by the same master, the presumption would be they were fellow-servants until the contrary was made to appear from the evidence; and, unless such a state of facts was shown as would remove this presumption, and serve to ground a verdict that the men were not fellow-servants, it was error to submit the question to the jury at all. We contend the court should, on the state of facts proved, have instructed the jury the men were fellow-servants and that no recovery could be had.

“Whether there is any evidence upon a given question or not, is a question of law for the court, and it is error to submit that question to a jury.” C., B. & Q. R. R. Co. v. Warner, 108 Ill. 538.

An instruction which assumes there is evidence of a fact when there is none, is misleading and erroneous, and serves only to furnish the jury a pretext to find against the real facts. C. & A. R. R. Co. v. Bragonier, 119 Ill. 51.

We think, under the principle of the above cases and in the light of the evidence, the relation of the men to each other resolved itself into a pure question of law, and should have been so treated by the Circuit Court. This court in the case of O'Bryan, 15 Ill. App. 134, held, as a proposition of law under the evidence, that O'Bryan was the fellow-servant of the offending employes.

Messrs. STEVENSON & EWING, for appellee.

Kelly and the train crew in charge of the freight train were not fellow-servants. Ryan v. C. & N. W. R. R. Co., 60 Ill.

C. & A. R. R. Co. v. Kelly.

171; C., M. & St. Paul Ry. Co. v. Ross, 112 U. S. 377; C. & N. W. R. R. Co. v. Moranda, 93 Ill. 302; P., F. W. & C. Ry. Co. v. Powers, 74 Ill. 371; C. & A. R. R. Co. v. May, Adm'x, 108 Ill. 288; C. & N. W. R. R. Co. v. Bliss, 6 Ill. App. 411; Rolling Mill v. Johnson, 114 Ill. 57; T. W. & W. Ry. Co. v. O'Conner, 77 Ill. 391.

Imprudent conduct from sudden fright is chargeable to the original wrong-doer. Collins v. Davidson, 19 Fed. Rep. 83; Stokes v. Staltonstall, 13 Pet. 189; Jones v. Boyce, 1 Starkey 493; C., R. I. & P. R. R. Co. v. Dignan, 56 Ill. 487; C. & A. R. R. v. Garney, 58 Ill. 83; Galena & C. U. R. R. Co. v. Yarwood, 17 Ill. 609.

It is negligence in a railroad company to make "running" or "flying" switches. C., B. & Q. R. R. Co. v. Triplet, 38 Ill. 482; C., R. I. & P. R. R. v. Dignan, 56 Ill. 478; I. C. R. R. Co. v. Backes, 55 Ill. 379.

It is negligence in a railroad company to run cars in on a side track, where other cars are standing and persons working about them, without giving notice of an intention to do so. I. C. R. R. Co. v. Hoffman, 97 Ill. 287; Rolling Mill Co. v. Johnson, 114 Ill. 57.

CONGER, P. J. This was a snit brought by appellee as administratrix of her deceased husband, Patrick Kelly, against appellant, in which she recovered a judgment for \$2,500.

The principal facts are as follows: Patrick Kelly was a section hand, employed by appellant upon a section of the road about seven miles in length, including the village of Hopedale. He worked under one James Mehan, foreman.

His duties were, as given by his foreman, as follows:

Mehan says: "I was his foreman; I had six men working under me; the men under me had to do all necessary work; anything that was ordered to be done under my control; the men under me were doing track repairing; it was our business to keep the track in repair; I had seven miles under my control; the men under me threw up embankments, raised up the track, put in rock and tilled under it, attended to the fences along the track and the ballasting, and any other thing we

had to do in the line of repairs. It sometimes becomes my duty to shove cars from one place to another with my men; I take hold of them to shove; do not get on the engine to run them; simply shove the cars from one place to another on the track; that is all I have to do with the cars." After Kelly had been in the employ of the company a few days, and on the 5th day of January, 1886, a freight or construction train started out from Bloomington for the purpose of hauling a load of rock to be distributed along the track two or three miles southwest of Hopedale for the purpose of ballasting the track. The train consisted of twenty-two flat cars, a caboose, and an engine. It was managed by a crew consisting of a conductor, engineer, fireman and two brakemen. The section force, including Kelly, had boarded the construction train as it passed Hopedale, and assisted in unloading the stone, or ballast, which work occupied them until the middle of the afternoon. The train had returned to Hopedale at noon to enable the men to get their dinner, and upon two or three other occasions to let other trains pass. When the unloading was completed and about three or four o'clock in the afternoon, the train with the men returned to Hopedale.

The train men began to prepare the train for returning to Bloomington and the section men were ordered by Mehan, their foreman, to take some old iron, which had been gathered up along the road at some former time and placed on the depot platform, and carry it across the main track and place it on a flat car standing on the side track, just opposite the platform. This car was no part of the construction train.

After some time spent by the trainmen in switching and arranging their train for its return to Bloomington, they desired to transfer the engine from the southwestern end of the train to the other, and they did this by a running or flying switch.

The train was backed up on the main track toward Bloomington, a sufficient distance for the purpose intended, and then started back, and after having acquired a speed of some eight miles an hour, the engine was cut loose from the train and, increasing its speed, ran in upon the side track, where three

or four cars were standing, upon one of which the old iron was being loaded by Kelly and others.

The engine did not go far enough upon the side track to let the train pass it without a collision, but the tender of the engine was struck by the caboose, breaking off the cross-beam and steps of the caboose and injuring the tender. The engine was at once moved forward by the engineer, striking one of the cars standing on the side track with such force as to break off the cowcatcher, break the headlight and the cast iron heading of the boiler, knock the trucks from under the car in front and throw it forward against the car upon which the iron was being loaded and which, from the force of the blow, was moved forward about its length. It produced considerable noise and confusion. Kelly, with another man, was at this moment placing a large piece of iron upon the car, and they had to step along with the moving car to keep it from falling to the ground. As soon as they could let go of it they did so, and turned to go across the main track to the platform. The train with the caboose in front was coming down the track at the rate of about eight miles per hour; Kelly's companion succeeded in reaching the platform, but Kelly was struck and killed by the train.

The errors assigned by appellant are, first, that Kelly was killed by his own negligence. It is insisted upon the one hand, there was great noise and confusion when the engine struck the car in front of it, amply sufficient to cause Kelly to lose his presence of mind, and, under the excitement of the moment, excuse him from what is claimed was negligence; while this is denied by appellant, and it is claimed there was nothing in the occurrence to excuse Kelly from such care and caution as a reasonable man would be expected to exercise. The determination of this question, under the circumstances, was one for the jury. It was for them to say, under the evidence, whether Kelly's conduct in attempting to cross the main track at the time, was careless and imprudent, and if it was, whether it was done under the excitement of sudden peril and alarm caused by the acts of appellant's servants.

As said in *C., R. I. & P. R. R. Co. v. Dignan*, 56 Ill. 487, "The question of negligence can be measured by no fixed and

unbending rule. Each case must be tested by its own peculiar facts. An act which might justly be regarded as inexcusably careless, if done coolly and deliberately, and with nothing to disturb the ordinary action of the brain, may, on the other hand, be pardoned as not unnatural if done under the excitement of sudden peril and alarm."

The second error assigned is that Kelly was a fellow-servant with the train men.

During the time Kelly was upon the train, going to and returning from the place of unloading, and while the stone was being unloaded, he and the train men were clearly fellow-servants. *Abend v. T. H. & I. R. R. Co.*, 111 Ill. 202. Prior to that time and after the train left Hopedale, they would not have been.

We think when the train returned to Hopedale, and the section men quit it, and began to load the old iron upon a car in no way connected with the train, the co-operation and association in furthering a particular business of the common master, in which they had been engaged up to that moment with the train men, ceased. The particular work of placing the ballast along the sides of the road, which had required their joint labors, had been accomplished; and each set of men returned to their former employment.

While it may be said the switching and arranging the train at Hopedale, preparatory to returning to Bloomington, was a part of the particular work of hauling ballast, as to the train crew, it was not as to the section men, for their joint duties with the train men had ceased as completely as though a day had intervened between the return to Hopedale and the accident.

The co-operation in the particular work of placing ballast upon the road-bed must have ceased at some time, and we hold it did cease at the moment when each set of men returned to their former and several duties; the train men to running their train, or preparing it to leave, and the section men to other and independent labor, under the direction of their foreman, in no way connected with the labor in which the train men were then engaged, or that had just before occupied the attention of both.

The fourth refused instruction of appellant was properly refused, for the reason that it sought to take the question of whether Kelly was a fellow-servant with the train men from the jury. *I. & St. L. R. R. Co. v. Morgenstern*, 106 Ill. 216. The first, second and third refused instructions were not accurate and would have tended to mislead the jury, and hence were properly refused.

It is insisted that the court erred in not giving to the jury a proper definition of what facts would constitute fellow-servants. We do not understand it to be the duty of the court to do so, unless asked.

The fourth assignment of error is that the damages are excessive. We see no evidence of passion or prejudice upon the part of the jury, and feel no disposition to interfere with their deliberate judgment as to the value of Kelly's life to his wife and family.

There is no fixed standard by which damages can be determined in cases like this, and when a jury, without passion or prejudice, have determined the amount, it should not be disturbed unless so high as to strike a court at first blush as unreasonable.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

INDEX.

ACKNOWLEDGMENT—See MORTGAGES, 5.

1. A strict compliance with both the substance and form of the statute in regard to the execution and acknowledgment of deeds and mortgages, is necessary to make the same effective to convey the homestead. *Wheeler v. Gage*, 427

ACTIONS—See ADMINISTRATION, 6; COVENANTS, 1; RAILROADS, 10; SALES, 8.

ADMINISTRATION—See APPEAL AND ERROR, 13; LIMITATIONS, 10, 15, 16.

1. The law does not allow an administrator to engage in litigation to settle conflicting titles. He must take and deal with the title as he finds it. *Irwin v. Wollpert*, 136

2. Upon a bill filed by an administrator to enforce the payment of an alleged balance of an annuity which was originally charged upon two lots, one of which was conveyed prior to the death of the annuitant, who joined in the conveyance, this court affirms the decree of the court below dismissing the bill for want of equity, the annuitant having had control of and derived all the income from the premises, either by herself or her agents, during her lifetime. *Id.* 136

3. The rule that a trustee can make no profit out of his office applies to all who hold fiduciary relations, and includes executors and administrators. *Colton v. Field & Leiter*, 354

4. Where the executor of an insolvent estate is released from the payment of further dividends by part of the creditors thereof, the remaining creditors are entitled to a *pro rata* distribution of any fund thereafter arising. *Id.*, 354

5. The legal right of action on a bond running to an administratrix for the benefit of the estate, is in such administratrix in her individual capacity. *Miller v. Kingsbury*, 532

6. In general, the action must be brought in the name of the one in whom the contract vests the legal interest. When the contract is under seal, the action must be in the name of the obligee, though the agreement be for the benefit of another. *Id.*, 532

7. A creditor of a deceased widow can not, in order to collect his debt, institute proceedings to have her award in the estate of her husband set off, she having used the entire estate without asserting such right. *Moore v. Sweeney*, 547

8. Where a widow, appointed executrix of her husband's estate and made his sole devisee, has failed to administer and has sold the prop

ADMINISTRATION—*Continued.*

erty, used the proceeds and removed to another State, her creditors can not claim the widow's award. Such acts amount to a waiver thereof.

Id., 547

9. Upon petition of creditors praying the appointment of an administrator of the estate of a deceased debtor leaving property in this State, his executrix having failed to qualify here, this court declines to interfere with an order for such appointment, although a year elapsed between the closing of the litigation fixing the liability and the filing of the petition. *Ires v. Jacksonville Nat. Bank*, 563

10. Upon exceptions filed to a report of an administratrix by a creditor of the estate of her deceased husband, touching her failure to charge herself with the proceeds of a certificate in a benevolent association of which her husband was a member, it is *held*: That, in accordance with the intention of the parties, the words "legal representatives" are to be construed as referring to the widow, orphans and heirs of the deceased; and that the administratrix is not chargeable as such with the proceeds of said certificate. *Murray v. Strang*, 608

AGENCY—See BANKS, 2; ESTOPPEL, 2; RAILROADS, 13.

1. An agency may be shown by the acts of the parties. The evidence in the case presented does not show that a third person was the agent of the plaintiff to receive payment of the note in question. *Arery v. Swords*, 202

2. In an action brought by a manufacturer of farm machinery, upon an agency contract to recover the value of machinery sold, it being alleged that the purchase price was lost because of failure of the agents to obey the instructions of the company, this court affirms the judgment for the plaintiff, the evidence being sharply conflicting and there being no substantial error in the instructions. *Van Dugn v. Aultman & Co.*, 603

AGENTS—See BROKERS.

AMENDMENT—See MORTGAGES, 5; PRACTICE, 7.

ANNUITY—See ADMINISTRATION, 2.

APPEAL AND ERROR—See AGENCY, 2; CRIMINAL LAW, 1, 3; EVIDENCE, 8; JURISDICTION, 1.

1. Where the verdict of the jury is based upon the evidence of the two parties to a suit alone, this court will not interfere. *Kelly v. Dandurand*, 25

2. This court will not reverse a judgment because it is slightly in excess of an account filed, especially on objection here first raised. *Id.*, 25

3. In the absence of a bill of exceptions the presumptions as to matters *dehors* the record are in favor of the verdict and judgment. *Treishel v. McGill*, 78

4. A finding of the court contrary to the decided weight of evidence is good ground for reversal. *Undell v. Howard*, 124

5. The appellant can not complain of an error committed by the

APPEAL AND ERROR—*Continued.*

court in settling the pleadings when no harm has resulted to him therefrom. *Graham v. Eiszner*, 269

6. The order and time of pleading rests in the sound discretion of the trial court, and the action of that court is not subject to review, unless it appears that such discretion has been improperly exercised to the prejudice of the party complaining. *Truesdell v. Hunter*, 292

7. An appellate court will not reverse a judgment when the evidence of the successful party considered by itself, without contravening evidence, is clearly sufficient to sustain the verdict. *Bowes v. City of Galesburg*, 321

8. A verdict will not be set aside for improper conduct on the part of the attorney for the successful party in making statements outside of the evidence, where it is plain that no harm has resulted therefrom to the appellant. *Id.*, 321

9. One defendant can not assign for error matters which do not affect him, but only affect a co-defendant who is not complaining and has not appealed. *Kankakee Coal Co. v. Crane Bros. Mfg. Co.*, 371

10. In an action to recover a share of the earnings, and for the care of certain horses, this court declines to interfere with the verdict for the plaintiff, the evidence being sharply conflicting and there being no error in the instructions. *Holloway v. Johnson*, 463

11. The plaintiff in error can not complain of an error which has not injured him, although it may have injured one who has not joined in the writ of error. *Locey Coal Mines v. Chicago, Wilmington & Vermillion Coal Co.*, 485

12. Where an execution has been erroneously awarded, the proper remedy, after the term, is appeal or writ of error. *Indian Grave Drainage District v. Root*, 596

13. An objection to the classification of a claim allowed against an estate can not be first raised in this court. *Beers v. Myers*, 648

14. An error without prejudice to the appellant, is not sufficient ground for reversal. *Id.*, 648

ARBITRATION—See LANDLORD AND TENANT, 4.

ATTORNEY AND CLIENT.

1. In an action to recover attorney's fees, it is *held*: That the evidence, though conflicting, sustains the verdict; and that there is no error in the instructions. *Bell v. Smith*, 181

2. An attorney may, by previous agreement with his client, acquire an equitable lien on a judgment recovered or the subject-matter of the litigation and proceeds thereof, for his fees and disbursements in the case. *Hawks v. Ament*, 390

3. A lien so acquired takes precedence of the claim of a subsequent assignee without notice, the interest of an assignee of a chose in action being limited by the equities of his assignor. *Id.*, 390

4. Business transactions between an attorney and client may be investigated in a controversy between them, and the burden of proof is upon the former to show the justice of his demands. *Hopkinson v. Jones*, 409

ATTORNEY AND CLIENT—*Continued.*

5. A statement of account between attorney and client is not conclusive upon the client. *Id.*, 409

6. Upon a suit brought by an attorney for the recovery of fees, instructions which, ignoring the relation of attorney and client, informs the jury that an account stated is final, are erroneous. *Id.*, 409

ATTORNEYS' FEES—See MORTGAGES, 4, 6.

AWARD—See ADMINISTRATION, 7, 8.

BAILMENTS—See WAREHOUSES.

BANKRUPTCY—See NEGOTIABLE INSTRUMENTS, 5.

1. A subsequent promise by a bankrupt to pay a note previously given by him is not required to be made after his discharge. It is sufficient to revive the note if made after the petition in bankruptcy is filed. *Wheeler v. Wheeler*, 385

BANKS.

1. A national bank may receive special deposits and give receipts therefor. *First Nat. Bank of Monmouth v. Strang*, 325

2. In an action to recover from a national bank the value of certain government bonds which had been specially deposited with a national bank which, having gone into liquidation, was succeeded by the defendant bank which had the same name, place of business, books, business, and substantially the same officers, the interest on said bonds having been regularly paid after the reorganization by the defendant until its own suspension, when the bonds were found to be missing, it is *held*: That, from the time of the organization of the new bank, the acts and declarations of the cashier within the scope of his authority were the acts and declarations of said bank; that his knowledge in regard to the bonds in question was the knowledge of both banks; that the payment of the installments of interest by the new bank was an admission that the bonds were in its possession; that the court below was warranted in finding that said bonds came into possession of the defendant bank upon its organization; and that the demand made, if any was necessary, was sufficient. *Id.*, 325

BASTARDY.

1. In a bastardy proceeding, it is *held*: That the defendant showed due diligence in endeavoring to procure the testimony of important witnesses, and failing in this was entitled to a continuance; and that under the facts, the record and the circumstances shown, his motion for a new trial should have been granted. *Common v. The People*, 230

BILLS OF EXCEPTIONS—See APPEAL AND ERROR, 3.

1. Where the time in which to prepare and present a bill of exceptions, by order of the trial court entered of record is extended to a day in vacation, under a rule of court providing that in such case the party preparing the bill shall give the opposite party a certain time within which to examine the original or a copy thereof, it is error on the part of the trial judge to sign the same until the full time has been accorded for such examination. *Treishel v. McGill*, 68

BONDS—See ADMINISTRATION, 5; MUNICIPAL CORPORATIONS, 9; PRACTICE, 17; TROVER, 1.

BOUNDARIES—See CONTRACTS, 2.

BREACH OF PROMISE.

1. In an action for breach of promise of marriage, this court reverses the judgment for the plaintiff, the verdict being unsupported by the evidence. *Boyer v. Sherer*, 545

BROKERS.

1. Where land, in the hands of a broker for sale, is sold by the owner, such broker or agent is entitled to his commission, if the sale was brought about through his efforts. *McConaughy v. Mahannah*, 169

2. Such commission is due when a purchaser is found who buys the property, and the right thereto is not affected by any modification of the terms of payment or modes of security, or ultimate compliance with the conditions of such sale made between the buyer and seller, different from the terms first given by the seller to the broker. *Id.*, 169

3. In such a case the compensation stipulated in the contract fixes the measure of compensation, without regard to whether it is adequate. *Id.*, 169

CARRIERS—See RAILROADS.

1. An express company receiving a package for transportation "C. O. D." is bound to transmit it to its destination, tender it within a reasonable time to the consignee and demand payment; and in case of non-acceptance and non-payment it is the duty of the company to notify the consignor. *American Express Co. v. Wettstein*, 96

2. The neglect by an express company to deliver a package and collect the amount required thereon, and to notify the consignor of such failure, for an entire week, will render the company liable as to the consignor in case of loss by fire. *Id.*, 96

CERTIORARI—See DRAINAGE, 1, 6.

1. The writ of *certiorari* is not a writ of right. Its allowance is within the sound discretion of the court and oral evidence may be heard as to whether it should be allowed. *Chapman v. Drainage Commissioners of District No. 3*, 17

2. Under the circumstances of the case presented the action of the petitioner in suing out the writ was too long delayed. *Id.*, 17

CONTINUANCE—See ATTORNEY AND CLIENT, 4; BASTARDY, 1; PRACTICE, 12.

CONTRACTS—See BANKRUPTCY, 1; DIVORCE, 1; LIMITATIONS, 4, 5; RAILROADS, 6; SALES, 13.

1. In an action to recover a balance claimed to be due on a contract for sinking a well, this court declines to interfere with the verdict, the evidence being sharply conflicting and there being no error in the instructions. *Condell v. Snyder*, 193

2. The breach of an agreement, entered into by several adjacent land owners to accept a boundary line as located by a surveyor, by one of them, does not destroy the obligations existing between the others. *Corrington v. Pierce*, 211

CONTRACTS—*Continued.*

3. The law does not regard the legal enforcement of a contract as oppression, although it may result in the sacrifice of the defendant's property. *Locey Coal Mines v. Chicago, Wilmington & Vermillion Coal Co.*, 485

COVENANTS.

1. The covenants of warranty and for quiet enjoyment when broken by actual ouster or eviction under paramount title, no longer run with the land, and a subsequent grantee has no right of action thereon. *Barry v. Guild*, 39

CRIMINAL CONVERSATION.

1. In an action to recover damages for criminal conversation with the plaintiff's wife, the marriage may be proved by a copy of the record thereof in a parish register. *Groom v. Parables*, 152

CRIMINAL LAW—See DISORDERLY CONDUCT, 1.

1. No appeal lies in criminal cases, a writ of error being the only mode by which such cases can be brought before this court. This rule applies to prosecutions for misdemeanors. *Anderson v. People*, 317
2. A prosecution under Sec. 21, Chap. 54, R. S., for rescuing cattle after they had been impounded, is a criminal prosecution. *Id.*, 317
3. Where the defendant prosecutes an appeal to the Circuit Court from a conviction before a justice in a prosecution for a misdemeanor, he can not be required to advance the fees of the clerk of the Circuit Court for docketing the cause. *McArthur v. Artz*, 466
4. In a proceeding by *scire facias* on a forfeited recognizance, evidence to show that, before the forfeiture, the principal had surrendered himself to the sheriff, is admissible. *Walton v. People*, 645
5. Where the surrender is voluntary and by the principal, a certified copy of the recognizance is unnecessary, particularly where the sheriff, acting upon his own acquaintance with the party and his own knowledge of the circumstances, accepts the surrender. *Id.*, 645

DAMAGES—See INJUNCTIONS, 2; LANDLORD AND TENANT, 3; LIMITATIONS, 6; RAILROADS, 4, 8, 10, 17, 22; TROVER, 1.

1. In actions to recover damages for personal injuries, there is no inflexible rule as to the measure of damages, except that the recovery is limited to compensation for injury and suffering. What is a proper allowance in a particular case rests in the sound discretion of the jury, subject to review and correction by the court in case of the abuse of such discretion. *Tomle v. Hampton*, 142
2. The measure of damages upon the breach of an undertaking faithfully to discharge the duties of a surviving partner, is the amount which would have been received in case of performance. *Miller v. Kingsbury*, 532

DEMAND—See BANKS, 2.

DISORDERLY CONDUCT.

1. In a prosecution under a city ordinance for disorderly conduct, this court declines to interfere with the verdict against the defendant, the evidence being conflicting. *Bowes v. City of Galesburg*, 321

DIVORCE.

1. A contract between husband and wife, dividing their property, in consideration of her refusal to live with him longer, entered into after he had made every reasonable effort to induce her to return to him, does not show collusion on his part for her to live separate and apart from him. *Parker v. Parker*, 22
2. A violent temper in a wife and the habitual use by her of opprobrious epithets toward her husband, will not justify personal violence on his part. *Wessels v. Wessels*, 253
3. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated; it is dependent upon future good conduct, and must be free and voluntary. *Id.*, 253
4. In the case presented, the proof supports the allegations of the bill, and the court erred in not granting a divorce to the complainant. *Id.*, 253
5. A court of equity has no power to make a decree for alimony a lien on personal property. *Yelton v. Handley*, 640
6. An execution under a decree for alimony can not be levied upon personal property which has been previously sold to a third person. *Id.*, 640

DOMICILE.

1. To effect a change of domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home. *People v. Connell*, 285
2. A husband may go to another State in quest of health for his wife and remain a considerable length of time without losing his residence in this State. *Id.*, 285

DOWER—See HUSBAND AND WIFE, 2, 3.

DRAINAGE.

1. The failure of the commissioners to classify lands which should be classified at zero because not benefited by a proposed ditch, is an informality which will not sustain a petition for a writ of *certiorari* to have the proceedings for the organization of a drainage district quashed. *Chapman v. Drainage Commissioners of District No. 3*, 17
2. The drainage acts are liberally construed to promote the object in view. *Id.*, 17
3. A question touching the failure of the record to show notice prior to the confirmation of the classification in question, can not be first raised in this court, especially as the record appears to have been made up by agreement. *Id.*, 17
4. In an action to recover damages for closing a ditch and thereby flooding the plaintiff's land, it is *held*: That an instruction touching the plaintiff's right to drain his land into a natural channel or depression was defective in not stating the hypothesis that, in order to justify the plaintiff in throwing water upon the defendant's land, there must be a natural channel, depression or outlet thereon; and that an instruc-

DRAINAGE—*Continued.*

tion touching the question of prescription, was erroneous. *Ribordy v. Pellachoud*, 303

5. One can not acquire a prescriptive right to flow another's land by the acquiescence of the latter for "several years." *Id.*, 303

6. When a drainage district embraces land in two counties, a proceeding by *certiorari* to review the proceedings of the commissioners is within the jurisdiction of the Circuit Court of either county. *Drainage Commissioners v. Griffin*, 561

7. Upon the proposed enlargement of a drainage district, it is necessary to give the same notice as is required when such district is originally formed. *Id.*, 561

8. In the case presented, the notice of the proposed enlargement was insufficient, the first publication thereof having been eighteen days before the term of the court at which the parties interested were to be heard, instead of twenty days, as required by the act of 1885. *Id.*, 561

9. The drainage acts of 1879 and 1885 do not contemplate the formation of districts so large as to require different systems of ditches in order to drain the lands therein embraced. *Klinger v. The People*, 575

10. Upon an information in the nature of a *quo warranto* charging that the respondents usurped the office of drainage commissioners, it is *held*: That no sufficient petition was presented for a district comprising four systems of drainage; that the court below properly entered judgment of ouster and for costs; that all the land in the town was improperly included, as but a small portion thereof would be benefited by the same system of drainage; and that such a district could not be administered under the acts of 1879 and 1885. *Id.*, 575

ELECTIONS—See QUO WARRANTO, 1.

EQUITY—See WITNESSES, 2.

1. Equity will not do that which will be of no benefit to the party asking it, but only a hardship to the party coerced. *Seeger v. Mueller*, 28

2. Where the bill of complaint against two defendants calls for answers under oath, each answer must be overcome by at least two witnesses, or what is equivalent to the testimony of two witnesses. *Heeren v. Kitson*, 259

ESTOPPEL—See SALES, 7.

1. In the case presented, the appellant having persuaded appellee to make advances upon certain statements of fact, of a large amount of money for his benefit, he is estopped to deny the truth of such statements. *Casler v. Byers*, 128

2. In an action against the agent of the owner of a certain farm to recover the amount paid by the plaintiffs as co-sureties with him on a promissory note given by the tenant on said farm to secure the payment of money borrowed from the landlord, the plaintiffs having signed said note as sureties with the defendant, upon his promise that he would apply certain moneys to be derived from the sale of stock on said farm,

ESTOPPEL—*Continued.*

which would pass through his hands, to the payment of said note, and upon his assurance as agent of the lender that a mortgage on the interest of said tenant in said stock would be good security, it is *held*: That the defendant can not now be permitted to show that the stock was the property of the landlord, the tenant having failed to pay for the interest claimed therein; and that the verdict for the plaintiff should be sustained. *Lichty v. Lower*, 199

3. An endeavor to collect from a third person funds wrongfully collected and withheld by him, is no waiver of the right to proceed against the debtor who carelessly and negligently placed them in the hands of such third person. *Arery v. Swords*, 202

EVIDENCE—See AGENCY, 1; APPEAL AND ERROR, 1, 7; BANKS, 2; CORPORATIONS, 1; CRIMINAL CONVERSATION, 1; MUNICIPAL CORPORATIONS, 10, 11; PRACTICE, 10; PRINCIPAL AND SURETY, 4; QUO WARRANTO, 1; RAILROADS, 3, 5; SALES, 1, 3, 4, 11; WILLS, 6; WITNESSES.

1. A contract foreign to the issue is not admissible in evidence, although it is alleged to be the same as the one in question. *Kelly v. Dandurand*, 25

2. A general objection to the introduction of a copy of a record does not raise the question of its secondary character, or as to its authentication, but only the question of its competency. *Groom v. Parables*, 152

3. In the case presented, it is *held*: That the refusal to allow the wife to testify was proper; and that the verdict for the plaintiff is supported by the evidence. *Id.*, 152

4. Testimony as to the value of a given article by a person who is not shown to have any knowledge thereof, is inadmissible. *Frederick v. Case*, 215

5. Parol contemporaneous understandings can not be allowed to vary an unambiguous written contract. *Graham v. Eiszner*, 269

6. Letters written by a party to a suit are inadmissible in his own behalf, the same being no part of a mutual correspondence. *Id.*, 269

7. A former contract in writing is inadmissible in evidence in a suit between the parties thereto upon one of later date and different tenor. *Id.*, 269

8. An error in the exclusion of evidence, which has worked no injury to the appellant, is not sufficient ground for reversal. *Aultman & Co. v. Ohl*, 601

EXECUTIONS—See APPEAL AND ERROR, 12.

EXEMPTIONS.

1. A deserted wife without children is a "family" within the meaning of Secs. 13 and 15, Chap. 52, R. S., and is entitled to personal property of the husband to the amount of \$400. *Berry v. Hanks*, 51

2. In the case presented, this court holds that a sale by the wife of property so exempt before the same was levied upon, and the taking of it back after such levy, can not be considered fraudulent, although the statute requires the scheduling of property before the allowance of the exemption for which the law provides. *Id.*, 51

EXEMPTIONS—*Continued.*

3. The omission of some property of the debtor from the schedule will not work a forfeiture as to the articles named therein. *Id.*, 51

4. While a debtor may select articles amounting in value to the exemption to which he is entitled under the statute, he must offer to turn over the balance of his property to satisfy the execution; failing to do this, he can not recover the statutory penalty merely because his choice was not respected. *Undell v. Howard*, 124

FEEES—See CRIMINAL LAW, 3.

FORMER ADJUDICATION—See MUNICIPAL CORPORATIONS, 2, 8; RAILROADS, 12.

FRAUD—See EXEMPTIONS, 2; NEGOTIABLE INSTRUMENTS, 9; PLEADING, 1, 2; STATUTE OF FRAUDS.

1. The mere failure of a creditor to make public his possession of judgment notes given to him by his debtor, is not fraudulent, where he does nothing to persuade or influence others to give the debtor credit. *Hegeler v. First Nat. Bank of Peru*, 112

FRAUDULENT CONVEYANCES.

1. Upon a bill to set aside an alleged fraudulent deed and a mortgage executed from a father to his son, it is *held*: That the father, being lawfully indebted to his son, might pay him in preference to other creditors; and that, while the testimony creates strong suspicion against the good faith of the transaction, it does not overcome the sworn answers. *Heeren v. Kitson*, 259

2. In an action of replevin to recover a coal office, shed and scales, taken under an execution against a third person, it is *held*: That the transfer of the property to the plaintiffs upon a sale before the levy of the execution was not fraudulent, the possession taken being sufficient in view of the nature of the property sold; and that, in the absence of specific objections, no error in the instructions appears. *Vanscoy v. Bigelow*, 301

3. A conveyance by a debtor solely to secure a future support is fraudulent as against creditors. *Parker v. Cain*, 598

4. A conveyance by a debtor in failing circumstances, who does not desire to make a general assignment, made in good faith in satisfaction of a particular indebtedness, is not fraudulent as against other creditors. *Weir & Creig v. Dustin*, 605

5. Upon a creditor's bill to set aside a conveyance made without consideration, as fraudulent, clear proof to impeach the judgment on which the proceeding is based for fraud, is required. Mere suspicion because of the amount of the judgment is insufficient. *Walters v. Walters*, 633

6. In the case presented, it being sought to subject the lands conveyed to a judgment obtained three years thereafter, chiefly for personal services covering many years, the conveyance in question having been made without consideration to defeat a claim that was apprehended but never asserted, and in secret trust for the benefit of the grantor, this court declines to interfere with the decree for the

FRAUDULENT CONVEYANCES—Continued.

complainant, the evidence being insufficient to show collusion, or that the judgment is excessive. *Id.*, 633

GUARDIAN AND WARD—See LIMITATIONS, 15.

HIGHWAYS.

1. This court affirms a decree dismissing a bill to enjoin the obstruction of a strip of ground which had been designated as a road on a plat of school lands, and subsequently condemned as impassable by the commissioners of highways, it appearing that the complainant has no design to improve or use the road, but is actuated by spite and malice. *Seeger v. Mueller*, 28

2. In an action to recover for injury to a horse and sulky, resulting from an altercation upon the highway, this court declines to interfere with the verdict of the jury, the evidence being wholly conflicting and apparently irreconcilable. *Besse v. Sawyer*, 248

3. In a proceeding by a town to recover a penalty for obstructing a highway by digging a ditch therein, the court below improperly directed the jury to find the defendants guilty, there being no evidence fairly tending to prove one of them guilty. *McIniry v. Town of Canoe Creek*, 483

4. In an action against county commissioners for allowing unsuitable timber to be used in repairing a bridge, thereby causing injury to the plaintiff's cattle, this court declines to disturb the judgment of the court below in favor of the defendants. *Loar v. Heinz*, 584

HOMESTEAD—See ACKNOWLEDGMENT, 1; HUSBAND AND WIFE, 2; MORTGAGES, 5.

HUSBAND AND WIFE.

1. Upon a bill for separate maintenance it is *held*: That the evidence sustains the decree; and that an allowance of \$20 per month is not excessive, the husband being worth from \$15,000 to \$20,000. *Farrell v. Farrell*, 27

2. A wife who releases her right to homestead and dower in the family home in consideration of being paid an adequate share of the purchase money, is reinvested with such rights upon the application of such share in part payment of a new one. *Nance v. Nance*, 587

3. Upon a bill filed by the administrator of the wife and certain of her heirs against the husband to declare and enforce a resulting trust, on account of the re-investment of money allowed the wife for her homestead and dower in a farm, it is *held*: That the transaction in controversy simply amounted to the transfer of the wife's rights of homestead and dower from one piece of property to another; and that the bill was properly dismissed. *Id.*, 587

4. Where two persons live together as husband and wife and are recognized and treated as such, the reputed husband is liable for family supplies, although the credit was extended to the reputed wife. *Hoyle v. Warfield*, 628

INFANCY—See PRACTICE, 17.

INJUNCTIONS.

1. Upon a bill to enjoin the collection of a certain school tax, it is *held*: That the order changing the venue to another county, though very informal, was sufficient; and that, in the absence of anything to the contrary, it will be presumed that the original files were duly transmitted. *Watts v. Stoltz*, 541

2. To sustain an allowance for damages upon a dissolution of an injunction, the evidence should be preserved in the record or the decree should contain such a recital of the proofs as to justify such allowance. *Id.*, 541

INSOLVENCY—See FRAUDS AND CONVEYANCES, 1.

INSTRUCTIONS—See ATTORNEY AND CLIENT, 1; CONTRACTS, 1; DRAINAGE, 4; FRAUDULENT CONVEYANCES, 2; HIGHWAYS, 1, 3; JUDGMENTS, 1, 2; NEGOTIABLE INSTRUMENTS, 5; PRINCIPAL AND SURETY, 4; RAILROADS, 7, 17, 21; SALES, 20.

1. It is proper to refuse an instruction which is argumentative, which invades the province of the jury, or calls attention to particular evidence. *Kelly v. Dandurand*, 25

2. It is sufficient if a series of instructions properly presents the law of the case, though one of the series, if disconnected, might be in itself objectionable. *Aultman & Co. v. Weber*, 91

3. It is proper to refuse instructions which undertake to state what acts done or omitted on the part of the deceased would constitute such negligence as to defeat a recovery. *C. & A. R. R. Co. v. Adler*, 102

4. In the case presented, it is *held*: That the appellant can not complain of an instruction setting forth that, if plaintiff was guilty of some negligence, yet if it was slight and the defendant's negligence was gross, when compared with each other, the plaintiff might still recover; that an instruction given by the court on its own motion though in part irrelevant, states correct propositions of law, and did not mislead the jury; and that the court properly refused to give certain instructions for the defendant, prepared on the theory that the landlord would not be liable if the premises were at the time of the accident in possession of a tenant. *Tomle v. Hampton*, 142

5. An instruction which ignores the main issue in the case, and is misleading in a serious degree, is not helped by a direction that it should be considered in connection with the other instructions in the case. The instructions should be harmonious and not contradictory. *Sargent v. Marshall*, 177

6. An instruction which is argumentative and has no sufficient basis in the evidence, is erroneous. *Id.*, 177

7. One can not complain of instructions which, though erroneous, are favorable to himself, nor of a refusal to give an improper instruction. *J. A. Roebling's Sons Co. v. Lock Stitch Fence Co.*, 184

INSTRUCTIONS—*Continued.*

8. An instruction which singles out a single important fact in the case is improper. *Avery v. Swords*, 202
9. There is no error in refusing to give an instruction which has no basis in the evidence. *Cleary v. Cummings*, 237
10. One can not complain of instructions, which, though open to formal objections, contain no error of substance. *Graham v. Eisner*, 269
11. It is proper to refuse an instruction which has no basis in the evidence. *Id.*, 269
12. Instructions should lay down the law in the fewest and plainest words, without repetition, and in a consecutive, orderly manner. This court strongly condemns the giving of an excessive number of instructions. *Id.*, 269
13. An instruction calling special attention to certain parts of the evidence is improper. *Wheeler v. Wheeler*, 385
14. It is improper to give instructions in support of inconsistent defenses. *Murtaugh v. Colligan*, 433
15. An instruction in the nature of an argument upon the facts and the duty of the jury in the premises, is erroneous. *City of Abingdon v. Meadows*, 442
16. The instructions must be in writing, unless that form is waived by the parties, and relate only to the law of the case. *Id.*, 442
17. Every intendment being in favor of the judgments of a court of general jurisdiction, where complaint is made of certain instructions, all others given should also appear in the abstract. *Id.*, 442
18. In the case presented, this court, upon a review of the instructions and the evidence, finds that there was no error in giving, modifying or refusing the instructions asked, and that the evidence supports the verdict for the defendant. *Ennor v. Hodson*, 445
19. An instruction having no substantial basis in the evidence is improper. *Trustees of Lincoln University v. Hepley*, 629
20. It is proper to refuse instructions which tend to mislead, or seek improperly to take a question from the jury. *C. & A. R. R. Co. v. Kelly*, 655

INSURANCE—See ADMINISTRATION, 10.

1. In an action on a policy of fire insurance, it is *held*: That, under a clause providing that the policy should become void if the house should become vacant or unoccupied, the owner can not be charged with *laches* in regard to a vacancy occasioned by the removal of his tenant on the day of the fire without the knowledge of the plaintiff. *American Central Ins. Co. v. Clarey*, 195

INTEREST—See LANDLORD AND TENANT, 5.

JUDGMENTS—See INSTRUCTIONS, 17; PRACTICE, 18.

1. The burden of proof rests upon one who seeks to impeach a judgment and enjoin its collection on the ground of fraud. *Daly v. Ogden*, 319

JUDGMENTS—*Continued.*

2. This court declines to interfere with a decree dismissing a bill to vacate a judgment and enjoin its collection, the evidence being sharply conflicting and no errors being assigned on the record. *Id.*, 319

3. It *seems* that, where the assignee of a judgment is put upon inquiry, he must, in making a reasonable effort to ascertain whether any claim exists against it, make inquiry of the attorney of the judgment creditor. *Hawk v. Ament*, 391

JURISDICTION—See PARTNERSHIP, 1; PRACTICE, 14; WATER-CRAFT.

1. In the case presented, it is *held*: That the court has jurisdiction of the appeal under the certificate of the circuit judge; and that Sec. 76, Chap. 110, R. S., has no application, the title to real estate being only incidentally involved. *Wheeler v. Gage*, 427

2. A county court has jurisdiction to enter a judgment in attachment against real estate, although the defendant is not personally served. *Smith v. Yargo*, 594

LACHES—See CERTIORARI, 2.

LANDLORD AND TENANT—See INSTRUCTIONS, 4.

1. To the general rule that the landlord is not liable where a third person is injured through a failure to keep in repair premises occupied by a tenant, there are two exceptions: first, when the landlord agrees to keep the premises in repair; second, where the premises were erected with a nuisance upon or connected with them, by means of which the injury complained of occurred. *Tomle v. Hampton*, 142

2. A landlord is not justified in driving his tenant out by force, even though the latter has forfeited his tenancy by a breach of the contract under which he holds. *Briggs v. Roth*, 313

3. In an action of trespass brought by a tenant against his landlord for endeavoring to drive him out by force and for driving away his stock, this court declines to interfere with the verdict for the plaintiff, although neither party is free from fault and the damages allowed might with much propriety have been less. *Id.*, 313

4. An agreement between landlord and tenant whereby the former is to take, at the termination of the lease, improvements erected thereon by the latter and pay therefor the sum named by appraisers to be mutually agreed upon, is not a submission to arbitration, and no notice to the parties is necessary before making the appraisement unless the lease so provides. *Pearson v. Sanderson*, 571

5. In the case presented, interest was properly allowed on the amount of the appraisal after notice to the defendant and request to pay such amount. *Id.*, 571

6. Payment of rent is a sufficient attornment. *Walker v. McDonald*, 643

7. In a proceeding by distress for rent alleged to be due under a parol lease, this court declines to interfere with the judgment for the plaintiff, the evidence being conflicting. *Id.*, 643

LIENS—See ATTORNEY AND CLIENT, 2, 3; DIVORCE, 5, 6; SALES, 12; WILLS, 1.

LIMITATIONS—See DRAINAGE, 4, 5; MORTGAGES, 9.

1. The statute of limitations does not apply to a legacy. *Langworthy v. Golden*, 119

2. The retention of a portion of the purchase money by the grantee, the deed providing that such sum shall be applied in payment of an incumbrance thereon, which he assumes, constitutes him the grantor's trustee, and he can not plead the statute of limitations to a bill to require him to discharge such indebtedness. *Moran v. Pellifant*, 278

3. The statute of limitations of 1872 is inapplicable to a note made in 1869. *Id.*, 278

4. Where two persons, as between themselves, by parol agreement, are each liable for one half the costs of an extended litigation, the one who is primarily liable as a party may await the enforced payment of the entire costs at the end of such litigation, and then compel the other to contribute his proportion, although more than five years have elapsed since certain of the items became due and payable, the contract being a continuing one. *Carter v. Carter*, 340

5. In the case presented, the question whether there was a verbal contract for the payment of the expenses of the suit in question, was for the jury, the evidence being conflicting. *Id.*, 340

6. The defense of the statute of limitations can only be interposed by plea. A stipulation limiting the plaintiff's claim for damages within five years is not equivalent to a plea of the statute of limitations, nor does it amount to a waiver thereof. *C. & A. R. R. Co. v. Glenney*, 364

7. The statute prohibiting the foreclosure of mortgages, unless within ten years after the right of action accrues, does not prevent foreclosure after the expiration of ten years, where the note or other evidence of indebtedness secured has been extended by payment or new promise. The right of foreclosure extends until such indebtedness is barred. *Kreitz v. Hamilton*, 566

8. The statute of limitations of 1872 is not applicable to contracts of prior date. *Tilton v. Yount*, 580

9. As a general rule, where a temporary incapacity to sue grows out of a particular provision of a statute, such disability interrupts the running of the statute of limitations. *Id.*, 580

10. In a proceeding to probate a note dated May 9, 1870, as a claim against the estate of the maker, the inability of the holder to maintain suit thereon against the administrator, for a period of one year, under Sec. 101, statute of wills of 1845, interrupted the running of the statute of limitations during the period of such inability. *Id.*, 580

11. Sec. 11 of the statute of limitations of 1872, prohibiting foreclosure of a mortgage or trust deed, unless within ten years after the cause of action accrues, is construed with reference to Sec. 16 of the same act, which provides for extensions by means of payment or new promise. The right of foreclosure extends until the indebtedness secured is barred. *Houston v. Workman*, 626

LIMITATIONS—*Continued.*

12. A purchaser of land under a decree of partition and sale, procured by the widow and children of the maker of a trust deed, may avail himself of the defense of the statute of limitations in foreclosure proceedings. *Id.*, 625

13. Where it appears on the face of the bill that the debt secured is barred by the statute of limitations, advantage may be taken of the bar on demurrer. *Id.*, 626

14. A trust, to be exempt from the operation of the statute of limitations, must be direct, and exclusively within the jurisdiction of equity, and the question touching it must arise between the trustee and the *cestui que trust*. *Beers v. Myers*, 648

15. A claim presented against the estate of a deceased guardian thirteen years after the claimant became of age, to charge the estate for funds, most of which were received by the deceased before his appointment as guardian, is barred by the statute of limitations. *Id.*, 648

16. In the case presented, the trust, if any, was neither direct nor within the exclusive jurisdiction of equity. *Id.*, 648

MANDAMUS—See SCHOOLS, 2, 4.

MASTER AND SERVANT—See RAILROADS, 14, 18-21.

MECHANIC'S LIEN.

1. Upon a petition to enforce a mechanic's lien for a hoisting engine, it is *held*: That the petition shows with sufficient accuracy where the engine was to be placed; that, as the time within which it was to be furnished was not fixed, the law implies that it should be within a reasonable time; and that there was no error in excluding evidence. *Kankakee Coal Co. v. Crane Bros. Mfg. Co.*, 371

2. When the contract, as set forth in the petition to enforce a mechanic's lien, is admitted to be correct, it is not error to refuse to allow the introduction in evidence of the original. *Id.*, 371

MORTGAGES—See LIMITATIONS, 7, 11; USURY, 3.

1. In proceedings to foreclose a mortgage brought by an assignee before maturity of the notes secured thereby, the mortgagor may interpose any defense of which he might have availed himself as against the payee of the notes. *Barry v. Guild*, 39

2. A mortgagor in possession can not defend a bill to foreclose a mortgage given to secure purchase money on the ground of defects in the title of his grantor. If such title is defective, he must rely for relief on the covenants in the deed to himself, or such other contract as he may have with the grantor. *Id.*, 39

3. To constitute a breach of either the covenant of warranty or that for quiet enjoyment there must be a union of ouster or eviction and lawful and paramount title. Otherwise there is no right of action on the covenants or ground for relief in a court of equity, in proceedings to foreclose a mortgage given to secure purchase money. *Id.*, 39

4. In the case presented, it is *held*: That, as between the parties, the original deed in question must be taken to be an absolute convey-

MORTGAGES—*Continued.*

ance; that the breaches of the covenants therein, if any, were choses in action which did not pass to the defendant by subsequent conveyances; that the evidence does not show an adverse possession under a paramount title; and that solicitor's fees were properly allowed. *Id.*, 39

5. Upon a bill to foreclose a mortgage, it appearing that, owing to the omission of the word "one," the description read, "township forty—(41)," to correct which supposed error the word "one" was inserted with the consent of the mortgagor and wife, after which the deed was re-acknowledged, no reference to a release of homestead or dower being made in the notary's certificate, it is *held*: That the mortgagors were entitled to no homestead as against the mortgagee; that the amendment added nothing to the force of the mortgage; that the omission was simply an ambiguity which might have been explained by oral testimony; and that the correction related back to the original making of the mortgage, no new acknowledgment or record being necessary. *Casler v. Byers*, 128

6. What is a reasonable solicitor's fee in a given case is a question of fact to be determined by the weight of the evidence. In the case presented, an allowance of \$500 is sustained by a majority of the court. Smith, J., dissents, on the ground that the allowance is exorbitant, and the mode by which it was ascertained, illegal. *Id.*, 128

7. A conveyance of lands, absolute in form, made by a debtor to a creditor who, by separate instruments executed at the same time, agrees to re-convey upon payment of the indebtedness, is a mortgage. *Lynch v. Jackson*, 160

8. In the case presented, upon a bill to redeem, it is *held*: That the deed and contract in question are to be construed as a mortgage; that the mortgagee and his devisee, the defendant, having failed to declare a forfeiture and foreclose the mortgage after the expiration of the two years limited in the contract, the mortgagor is entitled to redeem and to an accounting for rents and profits, although his bill was not filed until a little over five years after the note became due; and that the defendant is chargeable with at least constructive notice of the rights of the complainant. *Id.*, 160

9. In this State it seems that the right of redemption against a mortgagee in possession extends during the statutory period for foreclosure. *Id.*, 160

10. Where a mortgage, given primarily to secure a note for a new indebtedness, includes personally secured notes for a prior indebtedness to the mortgagee, the proceeds of a sale of the mortgaged premises should be first applied in payment of the note, which is otherwise unsecured. *Jackson v. May*, 305

11. The right of personal securities to subrogation depends on whether they have first discharged the principal debt, and whether there are superior equities attaching to the mortgaged property in favor of other parties. *Id.*, 305

12. The operation of the rule that, as between the grantees of different portions of mortgaged premises, the respective parcels are liable

MORTGAGES—*Continued.*

in the inverse order of their alienation, may be waived, limited or modified by the deed to the earliest grantee, so as to bind such grantee and those claiming under him. *Vogel v. Shurtliff*, 516

MUNICIPAL CORPORATIONS.

1. In a suit to recover damages for an injury occasioned by the wrongful or negligent manner in which work is done on the streets of a city, it is unnecessary to prove that it was done by persons employed by the city, such being the reasonable presumption. *City of Peoria v. Crawl*, 154

2. Where a municipal corporation which has been required to pay damages for a personal injury caused by a defective sidewalk, the owner of the abutting property having joined in the defense, brings suit to recover the amount so paid from such owner, he can not again litigate questions involved in the first suit. *McDonald v. The Village of Lockport*, 157

3. In the case presented, it was only necessary for the plaintiff to prove that the negligence of the defendant was the cause of the injury, and that judgment against it had been obtained and paid. *Id.*, 157

4. A village board of trustees can only bind the village when acting in their corporate capacity, and such act must be of record. Instruction or directions to a police constable by individual members of the board acting separately do not bind the municipality. *Id.*, 157

5. In the case presented, the court properly directed a verdict for the appellee, it having made by its evidence a *prima facie* case, and the defendant having failed to make any defense. *Id.*, 157

6. The constitutional limitation of municipal indebtedness applies to a contract for a term of years relating to ordinary current expenses, payable out of current revenues. *Prince v. City of Quincy*, 490

7. A municipal corporation is not liable in tort, when the alleged tort arises from the breach of a contract which is void by prohibition of the Constitution. *Id.*, 490

8. In the case presented, it is *held*: That monthly installments for water, due the owner of water works, under the terms of a contract for a period of years, constitute a municipal indebtedness; that a failure to pay such installments out of current revenues, the municipality being already indebted beyond the constitutional limit, does not amount to a tort; that a former suit in assumpsit operates as a former adjudication; and that the use of water by the defendant without intending to pay for it was not fraudulent. *Id.*, 490

9. In a proceeding to enjoin the payment of certain bonds issued by a municipal corporation, upon the purchase by it of certain lands for cemetery purposes, and to cancel the purchase, it is *held*: That the injunction obtained by the plaintiff in the court below as to the first series of bonds should have been made perpetual, it not appearing that they were returned upon the subsequent and valid issue of bonds for the same purpose; that the ordinance for the purchase of said lands under which the second issue of bonds was made, complied with the

MUNICIPAL CORPORATIONS—*Continued.*

statute, and was a valid exercise of municipal authority; that persons employed by virtue of the resolution authorizing the purchase and the first issue of bonds are entitled to compensation, although the first purchase was invalid, there being a "contingent fund" previously appropriated out of which they can be paid; and that the title to the lands in question, though subsequently acquired, relates back to the time when the labor was performed. *Dehm v. City of Havana*, 520

10. In a prosecution under an ordinance by a municipal corporation to recover a penalty for excavating and obstructing a street, wherein the plaintiff's claim rests solely upon the extent of actual possession shown, its proof of such possession of the strip of ground in question is not so convincing as to require the reversal of the judgment for the defendant. *City of Bloomington v. Graves*, 614

11. In such cases title deeds, maps and plats are admissible in evidence to show the extent of the defendant's possession, but not to show the title, which is not involved. *Id.*, 614

NAMES—See NEGOTIABLE INSTRUMENTS, 4.

NEGLIGENCE—See INJUNCTIONS, 3, 4; MUNICIPAL CORPORATIONS, 3; RAILROADS, 1, 2, 7, 9, 14, 15, 17, 18.

1. Where one of innocent parties must suffer loss the one whose negligence caused such loss must bear the same. *Avery v. Swords*, 202

2. The law will not hold another liable for the loss of property where the owner has stood by and seen it go to waste, when by reasonable exertion and expense he might have saved it. *Graham v. Eiszner*, 269

NEGOTIABLE INSTRUMENTS—See PRACTICE, 10; PRINCIPAL AND SURETY, 1, 2, 3, 4; SALES, 1; USURY, 3.

1. A promissory note in the hands of a third person can not be affected or incumbered by private independent agreements between the parties thereto. *Avery v. Swords*, 202

2. It is gross negligence on the part of the maker of a note to pay the same without having it surrendered to him, or being certain that the payment is to the proper party. *Id.*, 202

3. In an action on a promissory note, given in payment for land to which the title has failed, and accepted, when so given, by the plaintiff for an indebtedness due himself from the grantor of the land, it is *held*: That there is no variance between the pleadings and proofs; that the verdict for the defendant is sustained by the evidence; and that there is no error in the instructions. *Ball v. Ballenseifen*, 221

4. A person may adopt any name, style, or signature over which he may transact business, issue negotiable paper and execute contracts, wholly different from his own name, and he may sue and be sued by such name, style, or signature. *Graham v. Eiszner*, 269

5. In an action against an estate on a promissory note, the defense being want of consideration because given to save something out of a bankrupt estate, and discharge in bankruptcy, it is *held*: That it was

NEGOTIABLE INSTRUMENTS—*Continued.*

improper to instruct the jury that, to entitle the plaintiff to recover against the certificate of discharge, the burden of proof was upon him to show that his claim was fair and honest and that the promise to revive the note was made after the maker's discharge in bankruptcy; that, upon the production of the note with evidence of a subsequent promise by the maker after the filing of his petition, the burden of proof to show want of consideration was upon the defendant; and that the instruction in question was misleading in regard to whom the subsequent promise was made. *Wheeler v. Wheeler*, 385

6. In an action on a note and to recover money paid by the plaintiff as surety on a second note, the defendant can not repudiate the second note because it was raised in amount after it was executed by him as maker, and at the same time deny his liability on the first note on the ground that it was paid by the proceeds of a transfer of the second note. *Murtaugh v. Colligan*, 433

7. A promise by the purported maker to pay a forged note binds him without any new consideration, provided he has full knowledge of the facts affecting his rights. *Id.*, 433

8. Where a note is assigned after maturity, matters of set-off in favor of the maker as against the payee accruing after such assignment, can not be allowed. *Id.*, 433

9. The maker of a promissory note may settle the same with the real owner, and thereby defeat an action thereon brought by a holder merely for collection. Questions as to the sufficiency of the amount paid in settlement and whether the owner has been defrauded, can not be raised in such action. *Ennor v. Hodson*, 445

10. In an action on a promissory note, it may be shown that the plaintiff is merely a holder for collection, in order to let in the defense of payment and settlement made to and with the payee. *Id.*, 445

11. In an action brought upon an endowment fund note given for the benefit of an educational institution, it is *held*: That the struggling condition of the institution and its failure to take the position expected, constitute no defense; and that the attempt to show a failure of consideration failed. *Trustees of Lincoln University v. Hepley*, 629

NEW TRIAL—See BASTARDY, 1.

1. A refusal to grant a new trial on the ground of newly discovered evidence is proper when the same is merely cumulative and not conclusive. *Cleary v. Cummings*, 237

2. A new trial will not be granted upon the ground of newly discovered evidence when the same is merely impeaching and not conclusive in character. *Besse v. Sawyer*, 248

NOTICE—See CARRIERS, 1, 2; DRAINAGE, 3, 7, 8; JUDGMENTS, 3; LANDLORD AND TENANT, 4, 5; MORTGAGES, 8; REAL PROPERTY, 1, 3, 5; SALES, 5, 8, 14.

NUISANCES—See PERSONAL INJURIES, 2.

PARENT AND CHILD.

1. One who supports and cares for the child of another, treating it as his own, without really adopting it, can not recover for its board, in the absence of an express promise to pay therefor. Liability in such a case will not attach until the child has been tendered, or notice given that it will no longer be boarded free of charge. *Witzmann v. Koerber*, 174

PARTIES—See ADMINISTRATION, 6 ; PRACTICE, 6; RAILROADS, 6.

1. A decree will not be reversed for want of necessary parties, unless it affirmatively appears that the party in question was interested in the subject-matter of the suit before the commencement thereof. *Moran v. Pellifant*, 278

PARTNERSHIP—See DAMAGES, 2.

1. The joinder of two or more persons in a single adventure for their mutual advantage does not constitute them co-partners in such sense as to oust a court of law of jurisdiction in respect thereto. *Carter v. Carter*, 340
2. Upon a bill filed by a partner against his co-partners for an accounting and for other relief, it is *held*: That the contention of the complainant that the defendants had agreed that certain lands controlled by him should be taken in as part of the assets of the firm which was formed for the purpose of dealing in coal lands, is unsupported by the evidence. *Allison v. Perry*, 396
3. A parol contract of partnership to deal in lands, is not within the statute of frauds. *Id.*, 396

PAYMENT—See AGENCY, 1; NEGOTIABLE INSTRUMENTS, 2.**PERSONAL INJURIES—See RAILROADS.**

1. A person who has made a public sidewalk upon his own premises, can not be heard to say, an injury having occurred through a defect therein, that it was not a public way. *Tomle v. Hampton*, 142
2. An unprotected opening in a sidewalk, ten inches wide and five feet long, is a nuisance *per se*. *Id.*, 142

PLEADING—See APPEAL AND ERROR, 6; NEGOTIABLE INSTRUMENTS, 3; PRACTICE, 1, 2, 3, 5, 7, 8, 9, 14, 18; RAILROADS, 6, 15, 17.

1. Pleas charging fraud must state clearly and specifically the facts done or omitted which are supposed to constitute such fraud. *Salisbury v. Falk*, 297
2. In the case presented, the court below properly sustained a demurrer to the plea to the effect that the money sought to be recovered was advanced to the defendant for performing certain illegal services, there being a failure to state facts involving the parties in any willful fraud. *Id.*, 297

PRACTICE—See APPEAL AND ERROR; BILLS OF EXCEPTION, 1; CRIMINAL LAW, 1, 3; DRAINAGE, 3; EQUITY, 2; EVIDENCE, 2, 8; INJUNCTIONS, 2; INSTRUCTIONS; LIMITATIONS, 6, 13; MECHANIC'S LIEN, 2; MUNICIPAL CORPORATIONS, 4; PLEADING, 2; RAILROADS, 6; STATUTE OF FRAUDS, 3.

1. The matter of allowing new and independent pleas, presenting

PRACTICE—Continued.

new defenses, is addressed to the discretion of the trial court, and this court will not interfere, unless it appears that such discretion has been abused. *Ricker v. Scofield*, 32

2. After a plea in bar to an action, the defendant can not plead in abatement, unless for new matter arising after the commencement of the suit. *Id.*, 32

3. Pleas in abatement must be verified by affidavit. *Id.*, 32

4. Rules of court entered of record become the law of procedure in matters to which they relate until they are rescinded or modified by order of court entered of record. Such rescission or modification can not be made by a judge in vacation. *Treishel v. McGill*, 68

5. In the case presented, it was improper to allow the defendant to withdraw the general issue and file a special plea of payment, after a different presiding judge at a former term had refused such motion. *Arery v. Swords*, 202

6. A new party plaintiff may be joined with the original plaintiff, upon an appeal from a justice, after trial has begun in the Circuit Court. *Smith v. Martin & Oesterle*, 224

7. In this State bills, answers and replications may be amended, at any stage of the proceedings, on such terms as the court may impose. *Heeren v. Kitson*, 259

8. Where an affidavit of merits is attached to the declaration, the defendant has no right to file pleas without an affidavit of merits. *Truesdell v. Hunter*, 292

9. In the case presented, the affidavit attached to the general issue, putting in issue the signature of the note, was not such an affidavit of merits as the statute requires, and the court should have allowed the plaintiff's motion to strike the pleas from the files. *Id.*, 292

10. Where it is admitted, in a stipulation entered into for the purpose of dispensing with proofs, that certain notes are overdue and unpaid, a failure to produce the same upon trial, no demand having been made for them, is no ground for reversal. *Kankakee Coal Co. v. Crane Bros. Mfg. Co.*, 371

11. Where an answer of a witness is but a mere conclusion and is not responsive to the question, it should be stricken out. *Hopkinson v. Jones*, 409

12. The admission by a party against whom an affidavit for a continuance is made, that the absent witness will swear to the material facts therein stated, will not warrant the court in overruling the motion for a continuance, when it appears that the presence of the witness is necessary to a fair trial. *Id.*, 409

13. Where a suit is improperly brought in a county other than that in which the defendant resides or is found, service being made in an other county, it is proper practice to quash the writ and return and dismiss the suit upon motion. *McCulloch v. Ellis*, 439

14. The court below properly allowed, after the trial commenced, the verification of a plea denying the execution of the indorsement on the note in question. *Ennor v. Hodson*, 445

PRACTICE—*Continued.*

15. Where a jury is improperly influenced by remarks, allusions or comments outside of the evidence, made by counsel during the argument of a cause on trial, the verdict should be set aside. *Holloway v. Johnson*, 463

16. An indorsement by the court upon a proposition of law submitted, which amounts to a refusal to consider the same, sufficiently complies with Sec. 42 of the practice act. *Moore v. Sweeney*, 547

17. In a suit brought by a minor, by her next friend, the bond for costs may be filed, by permission of the court, after the commencement of suit. *I. C. R. R. Co. v. Latimer*, 552

18. The record of a judgment upon which a suit is brought is an instrument in writing within the meaning of Sec. 17 of the practice act, and a copy thereof must be filed with the declaration. The absence of such copy is sufficient ground for the reversal of a judgment entered by default. *Lambert v. Jones*, 591

19. This court declines to interfere with the action of the trial court denying a motion to vacate a levy and quash the execution at the second term after judgment was obtained. *Indian Grave Drainage District v. Root*, 596

PRINCIPAL AND SURETY—See ESTOPPEL, 2; NEGOTIABLE INSTRUMENTS, 6.

1. An extension of time that will operate to release a surety on a promissory note must be for a definite time, without the consent of the surety, and upon a new and sufficient consideration. *Truesdell v. Hunter*, 292

2. In an action against a surety on a promissory note, the burden of proof to support pleas of alteration and extension is upon the defendant. *Id.*, 292

3. Where the payee of a personally secured note takes, as collateral security, a note secured by mortgage maturing at a later date, this does not of itself, in the absence of an agreement to that effect, extend the time or discharge the surety. *German Savings Inst. v. Vahle*, 557

4. In the case presented, an instruction to the effect that the mere taking of a note having a longer time to run would not be conclusive proof of an extension, was improperly refused, and evidence to show whether there was an agreement to extend the time of payment was improperly excluded. *Id.*, 557

QUO WARRANTO—See DRAINAGE, 10.

1. In a proceeding by *quo warranto* to test the right and eligibility of the relator to the office of county judge, under Art. 6, Sec. 17 of the Constitution of this State, it is *held*: That the election and commission of the relator raise a strong presumption of his eligibility, and that the evidence does not overcome this presumption. *People v. Connell*, 285

RAILROADS.

1. It seems that a failure to look in the direction from which a train is expected, upon approaching a railroad crossing, if such train would

RAILROADS—*Continued.*

be visible to a person so looking, will defeat a recovery for injuries suffered by him from the train in question, although the bell was not rung nor the whistle sounded. *I. C. R. R. Co. v. Slater*, 73

2. It is not negligence in a parent to send minor sons of nine and thirteen years with a gentle team upon an errand which requires them to cross a railroad track at an established crossing. *Id.*, 73

3. Evidence as to the speed of the train at the time of the accident is admissible as part of the *res gestæ*. *Id.*, 73

4. The question of damages for causing the death of a child rests in the sound discretion of the jury. In the case presented, a verdict for \$1,000 is sustained. *Id.*, 73

5. Evidence as to the financial standing of the father, who sues as administrator for the use of the next of kin, is inadmissible. *Id.*, 73

6. In an action by a rolling stock company against a railroad company engaged in the general business of switching cars, to recover the value of several leased cars which were destroyed in the same conflagration, said cars having been switched at different dates, it is *held*: That if the plaintiff has a cause of action, it has a separate one for each car; that the fact that the declaration was amended after the cause of action was barred as to one of the cars, so as to include such car and to make appellees parties plaintiff, did not have the effect to revive the claim as to said car; that the owner of the cars was a proper party to bring the suit; and that such owner was in no way bound by contracts existing between the defendant and its lessees. *P. & P. U. Ry. Co. v. U. S. Rolling Stock Co.*, 79

7. In an action against a railroad company to recover damages for causing the death of plaintiff's intestate, it is *held*: That the court properly declined to instruct the jury to find for the defendant; and that the questions whether the deceased was in the exercise of reasonable care and whether the defendant was guilty of negligence, were for the jury. *C. & A. R. R. Co. v. Adler*, 102

8. The question of damages rests in the sound discretion of the jury. In the case presented, a verdict for \$2,400 for causing the death of a healthy, industrious man, twenty-one years of age, is sustained. *Id.*, 102

9. Persons using the streets in a city have the right to assume that railway trains passing over the crossings will be run with great caution and with due regard for their rights. *Id.*, 102

10. The owner of land, overflowed because of the existence of a railroad embankment, can not maintain an action against the railroad company for damages, unless the embankment has been created or changed so as to increase the damage to his land since he became the owner thereof. *C. & A. R. R. Co. v. Henneberry*, 110

11. An action lies against a railroad company for damages where, by making new and unnatural channels, it has thrown surface or other water upon the plaintiff's lands. *C. & A. R. R. Co. v. Glenney*, 364

12. In the case presented, the defendant is concluded by a former adjudication. *Id.*, 364

RAILROADS—*Continued.*

13. In *seems* that the agent of a railroad company sent to the scene of an accident in charge of a wrecking crew, has the implied authority to employ additional assistance, if, in his opinion, it is necessary. *Goff v. I., St. L. & K. C. R. R. Co.*, 529

14. The law will infer knowledge of defects in machinery and appliances provided by a master for the use of his employes, when, by the exercise of ordinary care on his part, he might have discovered the same. *Id.*, 529

15. In an action brought to recover for injuries suffered through the use of a defective rope, it is *held*: That the second count of the declaration states a cause of action, and that is not rendered defective by surplusage in the nature of an argument. *Id.*, 529

16. The word "station" in the statute, means the point or place where passengers usually board and leave trains. *I. C. R. R. Co. v. Latimer*, 552

17. In an action brought by a child, by her next friend, against a railroad company to recover damages resulting from her removal from the defendant's train at a place other than a station, it is *held*: That the declaration is sufficient, there being no misjoinder; that evidence to show that a "wild train" was following the train from which the plaintiff was removed, was properly admitted; that there is no substantial error in the instructions, and that the verdict for \$2,000 in favor of the plaintiff is not excessive. *Id.*, 552

18. The question of contributory negligence upon the part of an employe of a railroad company, injured in the course of his employment, should be left to the jury. *C. & A. R. R. Co. v. Kelly*, 655

19. A railroad section hand is not a fellow-servant of men in charge of a construction train, unless they are together co-operating in furthering a particular business of the common master. *Id.*, 655

20. In the case presented, the co-operation of the section hands and the crew of the construction train in placing ballast upon the road-bed ceased when they returned to their former and separate duties. *Id.*, 655

21. It was not the duty of the court to give the jury an instruction as to what facts would constitute the employes of the defendant fellow-servants, there being no request of that nature. *Id.*, 655

22. In the absence of evidence of passion or prejudice on the part of the jury in the case presented, this court declines to interfere with the verdict for the plaintiff for \$2,500 as excessive. *Id.*, 655

REAL PROPERTY—See CONTRACTS, 2; COVENANTS, 1; WILLS, 3, 4.

1. Such conveyances of record as are in the apparent chain of title to real estate, are alone required to be noticed by subsequent purchasers and incumbrancers. *Cunningham v. Thornton*, 58

2. In order to help out a defective description the law will not allow the false description to be rejected and the correct one inserted. *Id.*, 58

3. In order that the record of a deed should be constructive notice

REAL PROPERTY—*Continued.*

of its existence, it should lie in the apparent chain of title to the land in question. *Langworthy v. Golden*, 119

4. It is well settled that a claim of title based upon a parol agreement must be supported by evidence both clear and satisfactory, particularly when the claim is an old one. *Irwin v. Wollpert*, 136

5. A person having the actual possession of land will be regarded and deemed the true owner thereof until the contrary is made to appear. *City of Peoria v. Crawl*, 154

6. Upon a bill to require the grantee in a conveyance of real property to pay an incumbrance assumed by him as part of the purchase money, and to recover interest subsequently paid thereon by the grantor, it is *held*: That the alleged ignorance of the defendant is insufficient to overcome the clause in his deed whereby he assumed said incumbrance; that in the absence of proof to the contrary, he must be regarded as a man of reasonable intelligence and business qualifications; and that the burden was upon him to overcome the evidence of the deed and of the complainant's testimony. *Moran v. Pellifant*, 278

7. In an action on the case, brought to recover damages caused by the overflow of water from a gutter on the defendant's buildings, this court declines to interfere with a second verdict for the defendant, the verdict being supported by the evidence and there being no error in the instructions. *Meister v. Lang*, 624

RECEIVERS.

1. The statute reserving the right to redeem real property sold under execution, decree or foreclosure, or to enforce a lien, has no application to an order for the sale of realty held as assets by a receiver appointed by the court by consent of both parties, in proceedings under a creditor's bill, such sale being to secure funds with which to discharge mortgage incumbrances, receiver's certificates, and other claims against the owner. *Locey Co. v. Chicago, Wilmington & Vermillion Co.*, 485.

2. In the case presented, the finding of the master as to the value of the property was but of slight importance, as it can neither affect the indebtedness nor the amount of the sale. *Id.*, 485

REDEMPTION—See RECEIVERS, 1, 2.

REPLEVIN—See FRAUDS AND CONVEYANCES, 2.

RESCISSION—See SALES, 9.

RIPARIAN RIGHTS—See WATERS.

SALES—See BROKERS.

1. In an action brought by the payee on a note given in payment for a machine, where a warranty that the machine would do as good work as any in the market, and its breach, have been established, the defendant may introduce evidence to show the difference between the value of the machine at the time of such breach, and what it would have been worth had the warranty been true, and have such sum deducted from the amount of the note. *Aultman & Co. v. Weber*, 91

2. Where there is an express warranty, the question of an implied warranty does not arise. *Id.*, 91

SALES—Continued.

3. Where the defendant relies on an express warranty and states language used by the plaintiff sufficient to create such warranty, his evidence is not met by simple denial of the warranty. *Id.*, 91

4. In the case presented, the evidence supports the verdict for the defendant, and there was no error in the admission of evidence. *Id.*, 91

5. An innocent purchaser of property from a vendee in possession under a contract of sale with an unpaid vendor, without notice, acquires title. *Sargeant v. Marshall*, 177

6. The owner of personal property wrongfully taken from his possession is not bound to pursue it diligently and recapture it, under penalty, in case of neglect, of losing title, if sold to a third party. *Id.*, 177

7. The vendee is bound to know the title to personal property when he purchases, and the owner is not estopped, unless he stands by and sees a person about to purchase and makes no claim. *Id.*, 177

8. Where one contracts to deliver personal property in the future, at a certain price, and the vendee agrees to receive and pay for it at such time in accordance with the agreement, but afterward, and before the time arrives for delivery, repudiates the contract and gives the vendor notice of his intention not to perform it, the latter may accept such notice and elect to consider the contract at an end, and sue at once to recover damages for the breach, or he may decline to consider the contract annulled, and demand its performance on the part of the other party. *Roebeling's Sons Co. v. Lock Stitch Fence Co.*, 184

9. Where a certain commodity is sold to be delivered in installments, the failure of the seller to deliver the quantity required as to any installment gives the purchaser the power to rescind the entire contract. *Id.*, 184

10. Although the mere formal act of tender or offer to perform on the part of the vendor may be dispensed with where the vendee gives notice that the goods will not be accepted even if tendered, the vendor must be in position to perform if the notice be recalled. *Id.*, 184

11. In the case presented, evidence as to the amount which the refused wire brought at public auction was properly excluded. *Id.*, 184

12. It seems that goods, when tendered, must be in condition for immediate delivery, and not subject to any lien for freight, storage, or other charge which it is the duty of the vendor to liquidate. *Id.*, 184

13. In an action to recover the purchase price of a furnace, it is held: That the questions whether the contract was an absolute or conditional one, and whether the furnace properly heated the house, were fairly submitted to the jury; and that there is no such conflict between the evidence and the verdict as to require a reversal. *Frederick v. Case*, 215

14. The purchaser of a chattel, the contract being conditional upon its answering the purpose for which it was designed to the satisfaction of the vendee, must, within a reasonable time, if it proves unsatisfactory, so notify the vendor. *Id.*, 215

SALES—*Continued.*

15. This court affirms a judgment for a balance on account of goods sold on the ground that the defendant was jointly liable with another, and that the evidence shows a new promise within five years to pay the balance due. *Smith v. Marten & Oesterle*, 224

16. In an action to recover damages for the refusal of the defendant to accept certain carriages and harness, sold and delivered to him under a written contract, it is *held*: That the verdict for the plaintiff is sustained by the evidence; and that the trial court did not err in entering a judgment on the same, and in refusing a motion for a new trial. *Zeigler v. Studebaker Bros. Mfg. Co.*, 226

17. Where goods are sold for a stipulated price with the privilege of returning what remains unsold, or where it is agreed that the same may be paid for by a stipulated time or returned in good condition, such sale, as to third parties without notice, is valid. *Hadfield v. Berry*, 376

18. Where the consignee is at liberty to sell and receive payment at any price he likes, but is bound, if he sells the goods, to pay for them at a fixed price and time, the transaction is a sale. *Id.*, 376

19. In the case presented, the goods in question were liable to be levied upon as the property of the vendee. *Id.*, 376

20. In an action for an alleged breach of contract, whereby loss was sustained through the death of a Spanish jack received in a horse trade, it being claimed that his death was caused by his being ill-used by the defendant in driving him to the house of the plaintiff, it is *held*: That the verdict for the plaintiff was contrary to the evidence, and that the instructions were erroneous, particularly in not stating what would constitute an acceptance amounting to a waiver of defects. *Stearns v. Cook*, 511

SCHOOLS.

1. School officers possess only such powers as are directly granted by statute, or result by fair implication from those so granted. *Watts v. McLean*, 537

2. In the absence of an order by the directors or a court of competent jurisdiction for the payment of school funds, the treasurer of a district can not be required by *mandamus* to pay a judgment against such district from funds collected under a special levy for that purpose. *Id.*, 537

3. A copy of a special levy by school directors, merely certified by the clerk of the trial court, is no part of the record. *Id.*, 537

4. Where a demurrer to a petition for a *mandamus* is overruled and judgment rendered for the petitioner, this court can consider the petition only in the light of its averments. *Id.*, 537

SCIRE FACIAS—See CRIMINAL LAW, 4.

SEPARATE MAINTENANCE—See HUSBAND AND WIFE, 1.

SET-OFF—See NEGOTIABLE INSTRUMENTS, 8.

SHERIFF.

1. It seems that a date to the written appointment of a special deputy sheriff is not indispensable, where it appears that the appointment preceded the service made by such deputy. *Lambert v. Jones*, 591

STATUTE OF FRAUDS—See PARTNERSHIP, 3.

1. A parol agreement to pay the debt of another is within the statute of frauds, unless the same is in the nature of an original undertaking and is based upon a valuable consideration received by the promisor. *Murto v. McKnight*, 233

2. A promise by a son to pay the father's debt to enable the latter to have his property removed from the State without interference, the relation of debtor and creditor between the original parties remaining unchanged, is within the statute of frauds. *Id.*, 238

3. In the case presented, the defense of the statute of frauds was properly admitted under the stipulation that all material matters should be admitted under the general issue as if specially pleaded. *Id.*, 238

STATUTE OF LIMITATIONS—See LIMITATIONS.

SUBROGATION—See MORTGAGES, 11.

TAXES—See INJUNCTIONS, 1.

TENDER—See SALES, 12.

TORTS—See MUNICIPAL CORPORATIONS, 7, 8.

TRESPASS—See LANDLORD AND TENANT, 2.

TROVER.

1. The measure of damages in an action of trover is the current market value of the property at the time of its conversion with interest until the time of trial; no distinction or exception to this rule is recognized when the property converted happens to be bonds, and when the demand and refusal either constitute the conversion or afford presumptive evidence of it. *First Nat. Bank of Monmouth v. Strang*, 325

TRUST DEEDS—See MORTGAGES; LIMITATIONS, 11, 12.

TRUSTS—See ADMINISTRATION, 3; FRAUDS AND CONVEYANCES, 6; HUSBAND AND WIFE, 3; LIMITATIONS, 2, 14, 16.

1. Where a trustee has placed himself in a position antagonistic to the trust, he can not claim any benefit under the same. *Ennor v. Hodson*, 445

USURY.

1. An agreement for the payment of attorney's fees will not make usurious an otherwise valid contract or obligation, and it makes no difference whether the same was to be a certain sum, a reasonable sum, or a sum fixed at a certain percentage of the amount of either the debt or judgment. *Ricker v. Scofield*, 32

2. Where one of two loans is usurious, the other is not affected merely because they were made at about the same time and secured by the same mortgage. If the loans are in fact separate and independent, they will be so treated in regard to usury. *Jackson v. May*, 305

USURY—Continued.

3. Where a charge for expense and trouble on the part of the lender in securing money with which to make a loan is included in the note, the transaction is usurious. *Id.*, 305

VARIANCE—See NEGOTIABLE INSTRUMENTS, 3; WATERS, 1.**VENUE—See PRACTICE, 13.****WAIVER—See ADMINISTRATION, 8; ESTOPPEL, 3; MORTGAGES, 12; SALES, 20.****WAREHOUSES.**

1. Upon a deposit of grain in a public warehouse in this State, to be mixed with the grain of other persons, the depositor becomes owner of an equal quantity of grain of the same kind and quality as that deposited, the transaction being a bailment and not a sale. *Nat. Bank of Pontiac v. Langan*, 401
2. Grain so deposited is not subject to levy under execution against the warehouseman, and the owner may maintain an action for the conversion thereof when it has been sold under such execution. *Id.*, 401
3. One who is engaged in storing grain for a compensation in an elevator and its appurtenances is a public warehouseman under the laws of this State. *Id.*, 401

WARRANTY—See SALES, 1, 2, 3.

1. In the case presented, while the defendant was not permitted to add an express warranty to her written contract by parol, she had the full benefit of an implied warranty that the barrels in question were reasonably fit for the purpose for which she purchased them. *Graham v. Eiszner*, 269

WATER CRAFTS.

1. A proceeding under the "Water Craft Act," though in many of its features like a proceeding *in rem* in admiralty, is not within the exclusive jurisdiction of the Federal courts, the remedy being one which a common law court is competent to give, and the result reached being a judgment *in personam*. *Gindele v. Corrigan*, 477
2. In the case presented, the jury were warranted in finding the appellee to have been the owner of a canal boat, which was sunk in a collision. *Id.*, 477

WATERS—See DRAINAGE, 4, 5; RAILROADS, 10, 11, 12; REAL PROPERTY, 7.

1. Where the declaration claims damages for obstructing a water-course, and the evidence does not establish the existence of such water-course, the variance is sufficient ground for reversal. *C. & A. R. R. Co. v. Henneberry*, 110
2. Ordinary rains are all such, whether heavy or light, as are usual and always to be expected in certain seasons, annually. *Meister v. Lang*, 624

WILLS.

1. A legacy to a granddaughter, to be paid out of the testator's estate when she arrives at the age of eighteen, is a lien upon land be-

WILLS—Continued.

longing to the estate, where the personal property is insufficient.

Langworthy v. Golden, 119

2. In the construction of a will the intention of the testator, if not inconsistent with the rules of law, governs; and his intention is to be ascertained from the whole will and all its parts taken together. Every clause and provision should be given effect, if possible, according to his intention. *In re Estate of George Cashman*, 346

3. In the case presented, the second clause of the will in question gave to the widow a life estate in a certain tract of land, with power of election in her vested to have said land sold by the executors, and to accept instead thereof \$3,000 in money, to be accepted and held by her during her natural life, with the remainder, "or so much thereof as may remain unexpended," if any, to the testator's children, the same "to be accepted and held" and by her used and expended in her discretion for her own use and benefit. *Id.*, 346

4. The words, "or so much thereof as may remain unexpended," in law and fact, import a power of disposition in the widow and create a limitation of the remainder after the termination of her life estate. *Id.*, 346

5. A will signed by a husband and wife, the latter signing merely to show her consent to the disposition of property thereby made, is the will of the husband alone. *Chaney v. H. F. & F. Missionary Society*, 621

6. In making the proof required to establish the validity of a will, it is proper to show all that transpired at the time of its execution. The acts and declarations of the parties participating are admissible as of the *res gestæ*. *Id.*, 621

WITNESSES—See EQUITY, 2; EVIDENCE, 3, 4.

1. A witness having testified that he is acquainted with a person's signature from seeing it attached to papers known to have been signed by him, is competent to testify to a supposed indorsement by such person. *Ennor v. Hodson*, 445

2. In chancery, one defendant is competent to testify in behalf of a co-defendant on a question in the decision of which he has no interest. This rule is not impaired by Chap. 51, Revised Statutes. *Nance v. Nance*, 587

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